In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
NATIONAL EXCHANGE BANK OF PROVIDENCE. } No. 90.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This action was originally brought against the National Exchange Bank of Boston on August 27, 1901. (Record, p. 4.) On October 2, 1903, the writ was amended by inserting the name of the National Exchange Bank of Providence as the party defendant, and the suit was dismissed as to the National Exchange Bank of Boston. (Record, pp. 7 and 9.)

The action was brought to recover money paid by the subtreasurer of the United States in Boston on checks drawn on said subtreasurer by the United States pension agent at Boston in the name of various parties as payees, the indorsements of said parties on the checks having been forged. The case was tried in the Circuit Court upon an agreed state-

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ment of facts, from which it appears that the checks in question had been drawn by the pension agent upon the receipt of vouchers regularly made out containing proofs of the existence of the parties in whose favor the checks were drawn, the same, however, having been forged; that all of the payees were dead when the checks in their names were drawn, except two, who had been widows, but were remarried; that the names of the payees were forged thereon by one William A. Munson; that upon these forged indorsements the defendant bank cashed the checks and forwarded them to the National Exchange Bank of Boston, which presented them to the subtreasury in Boston, and received the money therefor, and forwarded the same to the defendant; that these checks were issued during the years 1892 to 1897, with the exception of five, in the name of Martha Crompton, which were issued in the years 1886, 1887, and 1888; that the fact that the indorsement upon either of said checks was forged was not discovered until June, 1897, when, on the 18th day of that month, a special examiner reported that the checks issued to L. J. Mooy, three in number, were probably paid upon forged indorsements; that on December 18, 1897, defendant was given notice by the United States Attorney at Providence that Mooy's indorsements on said checks were forged and that reclamation would be made for the money paid upon them; that upon further investigation, which was begun in February, 1898, it was discovered that the indorsements

upon the remaining checks were forged, this fact being ascertained from February 19 to May 28, 1898, and that on July 22, 1898, the United States Attorney at Providence made demand in writing upon the defendant for a refund of the money received upon these checks, in which demand it was stated that the alleged indorsements of the payees on said checks were forgeries. (Record, pp. 10–15 and 18–20.)

The case was heard in the Circuit Court without the intervention of a jury, and judgment was pronounced in favor of the plaintiff in the sum of $9,044.82. (Record, p. 17.) From this judgment a writ of error was sued out from the Circuit Court of Appeals, wherein the judgment of the Circuit Court was reversed, and plaintiff's action dismissed, and the case was remanded to the Circuit Court with directions to enter judgment for the defendant (Record, p. 47). To review the latter judgment plaintiff has removed the case to this court by writ of error, and has assigned the following errors:

> 1. Said court erred in holding that the plaintiff in error was bound to give prompt notice to the defendant in error of its discovery that the pension checks in question were forgeries.
>
> 2. Said court erred in holding that a failure to give prompt notice of the discovery of said forgeries was a bar to recovery by the plaintiff in error of the moneys paid by it to the defendant upon said checks.

3. Said court erred in holding that there was an unreasonable delay on the part of plaintiff in error in giving notice to the defendant of the discovery of said forgeries.

4. Said court erred in holding that, in the absence of evidence that the delay in giving notice of said forgeries to the defendant worked damage to said defendant, the plaintiff was not entitled to recover the moneys paid to the defendant upon said forged checks.

5. Said court erred in holding that said pension checks were to be considered in all respects as though they were commercial paper, and that the rules governing notice in the case of commercial paper should apply to said pension checks.

6. Said court should have held that the plaintiff in error was not liable to the imputation of laches because of any negligence on the part of its officers in giving notice to the defendant after the discovery of said forgeries.

7. Said court should have held that as it did not appear that the delay in giving notice of the forgeries to the defendant caused the latter any damage, that plaintiff in error was entitled to recover the moneys paid by it to the defendant upon said forged checks.

8. Said court should have held that said pension checks are not commercial paper, and that the rules governing notice of forgeries of commercial paper do not apply to them.

9. Said court erred in reversing the judgment of the Circuit Court and remanding the case to that court with directions to enter judgment for the defendant there.

ARGUMENT.

The only question considered in the Circuit Court was, whether or not plaintiff's right of recovery was defeated by its failure to give notice to the defendant of the forgeries of the indorsements upon said checks *immediately* upon their discovery; and upon this point the court held that plaintiff's right of action was not defeated by such failure, inasmuch as the defendant had in no respect been damaged by such delay. (Opinion, Rec., pp. 22 and 23.)

The Circuit Court of Appeals took an opposite view of this question, and held that plaintiff's right of action was defeated by its neglect to give notice to defendant *immediately* upon the discovery of the forgeries; and that court also considered the further questions as to whether or not pension checks are commercial paper in the strict sense of that term; and whether or not the Government could be charged with the laches or negligence of its agents in failing to give the necessary notice. The court resolved these questions also in favor of the defendant (Record, pp. 36–42), Judge Aldrich, however, filing a dissenting opinion upon all the points considered. (Record, pp. 42–46.)

We will discuss these three propositions in the order mentioned:

I.

Is the Government's right of action defeated by the failure of its agents to give notice to defendant of the forg indorsements immediately upon the discovery there

It is not insisted that plaintiff is barred by the failure to make an earlier discovery of the forgeries, or because the suit was not brought sooner after the forgeries were discovered and notice of same given to defendant, but the Circuit Court of Appeals was of the opinion that the right of action was lost because of the fact that *notice* of the forgeries was not given defendant *immediately* after their discovery, although there was no evidence of a change of conditions between their discovery and the time notice was given whereby defendant suffered any damage.

The authorities directly in point on this question are astonishingly meager, but we insist that the rule adopted by the Circuit Court of Appeals is not in accord with sound reasoning or with the weight of the authorities.

There are cases in which the language of the courts implies that notice should be given immediately upon the discovery of the forgery, but such expressions are ordinarily *dicta,* and in none of those cases does it appear that the point was considered with any degree of care. However, as this appears to have been the only question in this case considered in the Circuit Court, and the principal one considered in the Circuit Court of Appeals, the point has been more carefully looked into in the

present case by the learned judges who have heretofore had it before them than perhaps in any other reported case, and the result has been that two of those judges take one view of the question, while the other two entertain an opposing view.

The view that notice of the forgery must be given immediately upon its discovery undoubtedly arises out of some kind of supposed analogy between such notice and the notice of dishonor required in case of nonacceptance or nonpayment of a note, draft, or check, it being entirely overlooked that there is no substantial analogy between the two conditions, and that the reason for the rule in the one case does not exist at all in the other case. The theory upon which the notice of dishonor is required is thus expressed in 2 Daniel on Negotiable Instruments, section 970:

> It is regarded as entering *as a condition in the contract* of the drawer and indorser of a bill, and of the indorser of a note, that he shall only be bound in the event that acceptance or payment is only demanded, and he notified if it is not made. And in default of notice of nonacceptance or nonpayment, the party entitled to notice is at once discharged, unless some excuse exist which exonerates the holder.

It being a part of the contract that notice of dishonor shall be given indorsers before they can be held liable, such notice is therefore a part of the plaintiff's case (2 Daniel on Neg. Inst., sec. 971); and the fact that such notice has been given must

be averred in the plaintiff's declaration, either specifically or in general terms, or otherwise it will be fatally defective. (8 Cyc. Law and Proced., 126.) This is not true with reference to notice of a forged indorsement by the party paying the check. Such fact constitutes no part of the right of action, but the question of notice and the effect upon the defendant of delay in giving the same is solely a matter of defense. It was properly said by Judge Aldrich in his dissenting opinion, that—

> The moment the United States had paid the Providence bank money through mistake upon pension checks bearing forged indorsements there was created in its behalf by operation of law the right to recover it back. The question is, therefore, whether the United States has lost the right * * *. If the Government, therefore, has lost its right of recovery, a right which at one time existed, the loss of the right came by reason of negligence or laches resting in the failure to give notice. So it is not a case where diligence is an element of the plaintiff's case in establishing his right, because the right of recovery resulted by operation of law from the fact that the payments were made upon forged indorsements through mistake, and thus it follows, as it seems to me, that the negligence comes into the case as an element of the defense rather than as a necessary element in the plaintiff's case. Delay being a matter of defense, it is difficult to see why it should operate to bar recovery unless the

party receiving the money on forged indorsements has been damaged by the delay. (Record, p. 42.)

Since the question presents one purely of defense and not one going to plaintiff's original right of action, there is no reason why the circumstances in this case, or in any other similar case, should present any exception to the general rule that before negligence can create a cause of action, or can defeat a right of action already existing, some damage must result to the party relying upon the acts of negligence; and the further rule that he who relies upon negligence as a ground of recovery, or to defeat a right of recovery, has the burden of proving, not only the negligence, but the damage resulting therefrom.

This is especially true in view of the fact that forgery is something which is not contemplated in negotiating commercial paper, and consequently can not, by implication, enter into the contracts between various parties handling such paper.

The following authorities are in accord with the view above suggested:

In *United States* v. *National Park Bank* (6 Fed. Rep., 852) this precise question was considered by Judge Choate. That was an action to recover $100 paid by the assistant treasurer in New York on a draft drawn upon him for bounty, upon which there was a forged indorsement of the party in whose favor it was drawn. The payment was made in 1869. It was claimed that the forgery was discov-

ered in February, 1879, and that no information thereof was communicated to the defendant until February, 1880. Upon this question the learned judge said (p. 853):

> It is not alleged in the answer, nor is there any proof, that the defendant has suffered any loss or damage by reason of this delay or lost any remedy over against the party from whom it received the draft and to whom it paid the money. But it is contended that such delay is itself negligence of such a character that loss or damage will be presumed to have resulted from it. I think this point is not sustained, either by authority or the reason of the thing. Money thus paid under a mistake of fact is recoverable, because it is paid without any actual consideration and can not equitably be retained. The rule is equitable and may be defeated, where to allow the recovery would be inequitable. Negligence in the transaction, unattended with any loss or harm resulting from such negligence to the other party, surely does not impair the equity of the claim against him. Such negligence does not touch the reason of the rule allowing the recovery. If that negligence consists in delay in making the reclamation, with what justice can the party to whom the payment was made say that though he received the money under a mistake of fact and was bound to return it a year ago, and could not equitably or justly keep it then, because it did not belong to him; yet, now that the

> party paying has neglected to let him know of his claim after discovery of the mistake, he can justly and properly keep it? This would be absurd. The authorities are to this effect: That negligence in giving information of the mistake to the other party, with resulting loss of remedy over, is a defense, but otherwise not. The doctrine rests on the duty which the party paying owes to the other to shield him, as far as possible, from loss or damage resulting from the mistake when he discovers that it is such. If the failure to perform that duty results in loss or damage to the other party, then it is inequitable that he should be obliged to refund. But if that negligence has made no difference to him, then it is immaterial.

The same view is expressed by the Supreme Court of the District of Columbia in *United States* v. *Bank* (13 D. C. Rep., 296).

In *United States* v. *Onondaga County Savings Bank* (39 Fed. Rep., 259) the facts were that on July 25, 1882, a pension certificate was issued to Alma Wood; on August 3rd false vouchers were presented to the pension agent at Syracuse, and on the same day that agent drew two drafts for $1,000 and $924.80, respectively, upon the assistant treasurer of the United States, payable to the order of Alma Wood, and mailed them to her address. She, however, had died on July 8, 1882, and on the 8th day of August her name was forged to these drafts, and upon this indorsement the defendant bank cashed the checks, and on the following day col-

lected the amount thereof from the subtreasury. In the spring of 1884 the forgery was discovered, and in three days thereafter demand was made for a return of the money. Both the Circuit Court and the Circuit Court of Appeals for the Second Circuit (64 Fed. Rep., 703), held that the Government was entitled to recover. It is true that the question of delay in giving notice *after the discovery* of the forgery was not specially raised and considered, the principal defenses being that the Government was negligent in issuing the drafts after the pensioner's death, and that its agents were negligent in discovering the forgery, and that it had no right of recovery because it had refused to surrender the drafts which were necessary to enable defendant to collect from those responsible for the forgery; yet the conclusion reached by the court and its reasoning in support thereof is authority for the contention that the ordinary rules of negligence are applicable in this character of cases. And the statement of the Circuit Court of Appeals (64 Fed. Rep., 705) that "the proof shows that the bank was notified some three days after the forgery was discovered, which was certainly a reasonably prompt notice," indicates that the rule requiring *immediate* notice in case of dishonor of commercial paper does not apply to this character of case; otherwise, it would have been necessary to have given the bank notice *on the very day of discovery.* If such a rule does not apply, then what difference can there be between a delay of three days and three months,

provided the parties remain in the same condition?

When it is conceded that notice does not have to be given upon the day of discovery, then it becomes a question of what is reasonable diligence in giving notice; and ordinarily no delay is regarded as vital unless it has had the effect of placing the opposite party in a worse condition.

The holding of this court in *Cooke et al.* v. *United States* (91 U. S., 389, 402–403) is to the same effect. That was an action by the United States to recover money paid Cooke & Co. by the assistant treasurer at New York for the purchase or redemption before maturity of what purported to be eighteen 7–30 Treasury notes, but which, it was alleged, were counterfeit. Upon the question of the return of those notes to Cooke & Co., the court said:

> Neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the assistant treasurer, as will throw the burden of the loss upon the Government. The return should have been made within a reasonable time; and what is a reasonable time is always a question for the courts when the facts are not disputed. (*Wiggins* v. *Burkham,* 10 Wall., 133.) Here there is no dispute. The notes were delivered to the assistant treasurer on different days between September 20 and October 8. The first suspicion in Washington in regard to their character was October 5, when a note was found, of which, upon inspection of the record, a duplicate was al-

> ready in. All the notes were found and returned to New York October 12, and the next day Cooke & Co. were notified.

It appears, therefore, that in this case there was a delay of about eight days after the discovery that the notes were counterfeit. Therefore this court does not apply the same rule in requiring notice of the discovery of a forgery that is applied to notice in case of dishonor of commercial paper.

Cases can be easily conceived wherein a delay of eight days in giving notice would be fatal, and in which the court should hold that the plaintiff's right of recovery had been barred, but the plaintiff would be defeated, not by the mere delay in giving notice, *but by the fact that the defendant had been damaged by the delay.* It is the damage to the defendant that constitutes the material defense; but as long as the element of damage is absent we insist that the mere matter of delay can not affect the plaintiff's right of recovery.

In accordance with this contention, the following is quoted from the text of 5 Cyc. Law and Procedure, pages 546, 547:

> Although money paid by mistake can generally be recovered, the payment of forged paper is an exception. When payment is made to the holder of paper who has come into possession of it without any fault on his part, *and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money can not be recovered from him.*

In giving notice of forgery after its discovery there must be reasonable diligence, but mere lapse of time, however long, between the time of payment and notice of the forgery will not deprive the payor of his right to recover of the payee.

There can be no difference in principle, so far as the mere matter of delay is concerned, between a delay before discovery and a delay after discovery of the forgery; and yet, in all the cases, it is conceded that any length of delay in discovering that the indorsement is a forgery can not bar the plaintiff's right of action. In either instance the delay may be fatal to the other party, but in order to defeat a right of action there must concur the injury to the defendant and the negligence upon the part of the plaintiff. In case of delay before discovery the injury may result, but there is no concurrent negligence; while in the case of delay after discovery of the forgery there may be negligence, but if there is no concurrent injury to the defendant the payor's right of recovery can not be affected.

In *White et al.* v. *Continental National Bank* (64 N. Y., 316, 321, 322) the action was brought to recover money paid by plaintiffs to defendant upon a draft which had been raised from $27 to $2,750. The forgery was discovered about two months after the money was paid and defendant was at once notified. Upon the question of plaintiff's negligence in discovering the forgery the court said:

> It follows that there could be no negligence on the part of the plaintiffs which could de-

> feat their right to reclaim the money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation there was no estoppel to bar the action.

A comparison was drawn between the facts in that case and those of the case of *Continental National Bank* v. *National Bank of the Commonwealth* (50 N. Y., 575), wherein the officer of the bank pronounced a forged certification of a check to be genuine, upon which the payee of the check relied, and this was held to be an estoppel; and wherein if the teller of the certifying bank had disclaimed the forged certification and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the bank of the State of New York before he received the money on the gold checks and before he went to the subtreasury with the gold certificates; and upon the question of estoppel the court said:

> In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant or those from whom it received the bill could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. *Estoppels can not be based upon mere conjectures, even if a proper foundation is laid for them in other respects.*

This case, like the other authorities above cited, shows that in questions arising out of forgery the rights of the parties are to be determined by the principle of estoppel, and that inasmuch as an estoppel can not arise unless damage has resulted through the other party's conduct, a right of action in a case of this character is not barred by mere delay in giving notice.

As above stated, it is not insisted that plaintiff's action is barred by its delay in bringing its suit after the discovery of the forgery, and yet there would be as much reason in contending that plaintiff is estopped by its failure to bring suit immediately to recover the amount due from defendant as by insisting that it is estopped by delay alone in giving notice, since no damage resulted to the defendant by the delay, either in giving notice or in bringing suit; but if any damage had resulted as a consequence of neglect in either respect, the condition of the parties would have been different and the principle of estoppel would apply.

Mr. Daniel is also of the opinion that in case of forged indorsements the doctrine that the demand for restitution may be made within a reasonable time after the forgery is discovered, and that the mere length of time is not important is the wiser and juster rule. (2 Dan. Neg. In., sec. 1372.)

Defendant relies on the case of *United States* v. *Clinton National Bank* (28 Fed. Rep., 357), which was decided by Mr. Justice Brewer while circuit

judge. The facts in that case were that Rucker, a paymaster in the United States Army, drew a check on the assistant treasurer of the United States at New York for $100 bounty money, payable to the order of one Thrall. On October 26, 1868, the defendant bank presented this check to the assistant treasurer and received the money thereon. It was afterwards ascertained that the indorsement of Thrall upon the check was a forgery. On October 9, 1880, nearly twelve years thereafter, action was brought by the Government to recover the money paid on the forged indorsement. The defendant in its answer pleaded negligence and laches on the part of the Government, in that it was informed by the payee Thrall of the fact that his indorsement was forged soon after the payment of the check, and before the end of the year 1868, and that it never notified the defendant or any one else interested in the transaction *until about ten years thereafter and until the defendant had lost all opportunity to protect itself*. To this defense the plaintiff demurred. The court overruled the demurrer, and the plaintiff standing on the demurrer, judgment was entered in favor of the defendant.

It is not insisted by the Government in this case that if the defendant had lost the opportunity to protect itself on account of the delay in giving notice its defense would not be complete.

II.

Were the pension checks in question commercial paper in the strict sense of that term?

We insist that they were not, and that they fall within the rule laid down in the following authorities:

In *The Mayor* v. *Ray* (19 Wall., 468, 477) the question was whether the following instrument was commercial paper, to wit:

> No. 3521. $1000.
>
> Nashville, December 23, 1868.
>
> Treasurer of the Corporation of Nashville, pay to A. J. Duncan, or bearer, one thousand dollars on account of water work.
>
> A. E. Alden, Mayor. W. Mills, Recorder.
>
> (Endorsed:)
>
> Thomas G. Magrane, Treasurer.
>
> December 26, 1868.

It was held by this court that it was not a negotiable instrument. Upon this question the court said:

> Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due public creditors are of course necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes. But to invest such documents with the character

and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied. * * * But every holder of a city order or certificate knows that to be valid and genuine at all it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts can not create an estoppel against the city itself, its taxpayers, or people. Persons receiving it from them know whether it is issued, and whether they receive it for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients, and all subsequent holders take *cum onere* and are affected by the same defect.

This rule was followed in *Wall* v. *County of Monroe,* 103 U. S., 74, 78; *Claiborne County* v. *Brooks,* 111 U. S., 400, 408; *District of Columbia* v. *Cornell,* 130 U. S., 655, 661. In each of these cases the instrument in question was in form a negotiable instrument, but they were held to be not negotiable for the reasons given in the above quotation from *The Mayor* v. *Ray.*

It is apparent that these reasons apply with equal force in the present case. Every one who accepts a pension check and pays the money therefor does so with the knowledge that they are being issued by the tens of thousands every year; that it is practically impossible for the authorities to keep track of every pensioner and to know for a certainty whether or not he or she is still alive; that the authority of the pension agents is expressly restricted by statute, and a check issued upon forged vouchers is an absolute nullity, because in such case the agent is wholly without authority to issue the same. Furthermore, a check of this character is not issued by the Government as a part of a business transaction, there being no consideration in a legal sense for the check. In this respect it is to be distinguished from those cases where a draft has been drawn in payment for services and has been accepted by an assistant treasurer or by some officer of the Government. Upon this question the *Floyd Acceptances case* (7 Wall., 666, 676) has a material bearing. In that case drafts were drawn on Hon. J. B. Floyd, Secretary of War, by certain con-

tractors, and said Floyd, as such Secretary, undertook to accept the same, and upon the faith of his acceptance they were negotiated. It was held by the court that they were not negotiable paper, but were totally void, inasmuch as the Secretary of War was without authority to make such an acceptance, the court saying:

> Whenever negotiable paper is found in the market purporting to bind the Government, it must necessarily be by the signature of an officer of the Government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the Government.

It is conceded, and there are no authorities to the contrary, that if the pension checks in question in this case were not strictly commercial paper, then the rule that it is necessary to give notice immediately upon the discovery that the indorsements were forgeries does not apply.

III.

Can the Government be bound by the laches of its officers in failing to give notice within proper time that the indorsements on the checks in question were forgeries?

It is true that in *Cooke* v. *United States* (*supra*) it was held that, when the Government becomes a party to a negotiable instrument, it is bound to take the same steps to perfect its rights as is an ordinary individual. This rule, of course,

does not apply in case the checks in question are not negotiable instruments. Furthermore, we insist that it should not be applied here, even if it be held that the checks are negotiable instruments, because, as heretofore shown, the Government's right of action does not depend upon the giving of notice to the defendant. If such notice were a necessary prerequisite to the bringing of the action, as is the fact of giving notice of the dishonor of commercial paper, then undoubtedly the rule laid down in *Cooke* v. *United States* is a proper one. But where plaintiff's right of action exists, and the neglect to give notice can only be set up as a matter of defense, then it presents precisely the same question as any other act of negligence upon the part of the Government's officials; and there is no more reason why its right of action in a case of this kind should be barred by failure of its agent to give notice, than why its right of action on an official bond should be barred by the neglect of its officials to take action against the sureties in proper time.

It is insisted, therefore, that the judgment of the Circuit Court of Appeals should be reversed, and that judgment should be here entered for the plaintiff against the defendant for the amount for which judgment was rendered by the Circuit Court, with interest thereon to date.

J. A. FOWLER,
Assistant Attorney-General.

DECEMBER, 1908.

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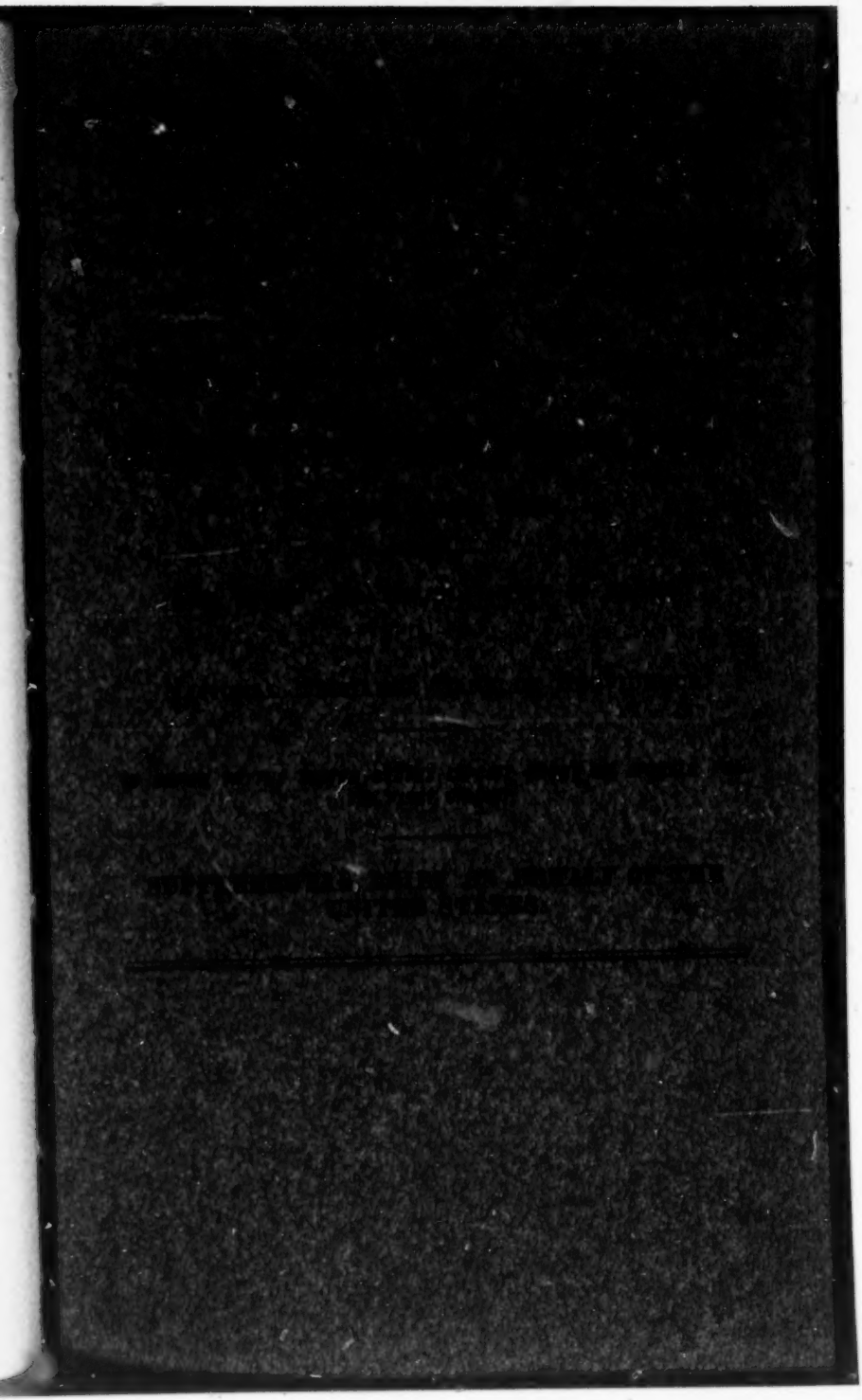

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN error,
v.
NATIONAL EXCHANGE BANK OF Providence.
} No. 90.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

I.

It is first insisted that it was necessary for the United States to have given notice of the forgery within a reasonable time after the payment of the checks.

In our former brief it was assumed that there was no insistence that the plaintiff was deprived of its right of recovery by the lapse of time from the payment of the checks to the discovery of the forgery. This assumption was based upon the fact that there is nothing in the record to indicate that it was insisted to the contrary in the court below; and upon the state-

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ment by the court, in the opinion of the majority, of the question involved, in the following language:

> It is to be noted that this case does not involve the rule, which arises out of payments by a bank of checks drawn upon itself bearing an apparent but forged signature of one of its customers. It relates only to the demand for the repayment of money paid on account of forged or false indorsements of signatures of individuals whose signatures the United States were not bound to know, as a bank is bound to know those of its customers. It is also to be noted that there is no suggestion made before us that either the bank in question here or the United States have been guilty of negligence except in the particular to which our attention has been brought, namely, an unreasonable delay on the part of the United States in giving notice of the discovery of the false signatures or forgeries.

But inasmuch as this question is raised by defendant in error we submit that it is contrary to the great weight of authority, as shown by the cases cited under both this and subsequent heads in defendant in error's brief. We do not, in fact, understand that the English authorities support the contention that it is necessary to give notice of the forgery within a reasonable time after payment, when the forgery consists of a forged indorsement.

In *Cocks* v. *Masterman* (9 B. and C., 902), which is cited as laying down the English rule upon this

question, the action was brought by a bank to recover money paid another bank upon a forged acceptance by a depositor of the plaintiff bank. It appeared that the bill was paid by the plaintiff the day upon which it became due, with the three days of grace added, but the plaintiff did not present the same to the acceptor whose name was forged and who was a client of the bank until the following day, and consequently notice of its dishonor was not given upon the day of payment. Recovery was disallowed upon the specific ground that it was necessary that notice of dishonor be given upon the day of payment in order that other indorsers might be held, and such notice not having been given such indorsers were thereby released. This, of course, was an early statement of the general rule which has ever since been recognized as the law relating to commercial paper, but has no application to the facts in this case.

In the case of *United States* v. *Cooke* (Fed. Cases, No. 14855) the facts were that the name of Charles M. Colton, assistant surgeon, U. S. Army, was forged to an order drawn upon a paymaster of the United States Army, and the order was cashed by McVay & Co., who sent it to the defendant, Cooke & Co., by whom the money was collected from the paymaster. This occurred in June, 1863, and the forgery was not discovered until 1869; and in November, 1869, action was brought to recover the amount paid, it not appearing that any previous notice had been given. The court stated to the jury that the case did not

differ from the familiar one where an individual paid a check on the faith of the signature of the drawer, and directed a verdict for the defendant. Upon a motion for a new trial, the court said that the delay of more than six years which had elapsed was fatal to the claim of the United States, and that all the cases require the utmost diligence on the part of the drawee, a diligence analogous to that required in giving notice of the dishonor of commercial paper.

It was, of course, the duty of the Government to know the signature of the drawer of that paper, while it was not required to know the signatures of the indorsers of the numerous checks in question in the present case; and it is well recognized in the authorities that there is a broad distinction between the rights of the payee when the drawer's name to a negotiable instrument is forged and his rights when the name of an indorser thereon is forged. However, if the general remark made by the court be considered as sustaining defendant in error's contention that the time which elapsed between the payment of the money and the discovery of the forgery may create a bar to recovery, it is entitled to but little weight when considered in the light of the numerous authorities to the contrary.

This question, as will be shown under the next head, was not involved in the case of *United States Bank* v. *Bank of Georgia* (10 Wheat., 333).

II.

We will briefly consider some of the authorities cited to sustain the contention that it was necessary for plaintiff to have given immediate notice of the forgery when the same was discovered.

Defendant states the proposition that it was necessary to give notice within a *reasonable time* after the discovery of the forgery; but manifestly its theory is that notice within a reasonable time means immediate notice, for otherwise, as stated and insisted upon in our former brief, it would be necessary for the court to take into consideration all the facts and circumstances and determine therefrom whether or not any injury to the defendant did, as a matter of fact, result in consequence of the delay in giving the notice; and there would be no general rule as to what constitutes a reasonable notice, but every case would have to be determined upon the particular facts involved therein.

As above stated, the case of *United States Bank* v. *Bank of Georgia* (10 Wheat., 333) has but little or no bearing upon the principle presented for decision in the present case. In that case the Bank of Georgia had issued the bank notes in question, and while in course of circulation they were fraudulently altered, and having found their way into the Bank of the United States, it presented them to the Bank of Georgia, who received them as genuine and credited them to the general account of the Bank of the United States as cash by way of deposit. It was held by the

court that the Bank of Georgia was bound to know its own paper and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions, and that its acceptance of this paper estopped it from subsequently insisting that it was not genuine. Immediately preceding that part of the decision quoted in the majority opinion in the court below, and also in defendant's brief, the court said:

> And in respect to persons equally innocent, where one is bound to know and act upon his knowledge and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in the payment of such notes, which its own acts have deliberately assumed to be genuine (p. 343).

And it was to emphasize this principle, when applied to the facts in that case, that the remarks quoted were made.

In *United States* v. *Central National Bank* (6 Fed., 134) the action was brought to recover $100 and interest, which had been paid to the defendant upon a draft drawn March 24, 1868, upon the assistant treasurer of the United States by C. Holmes, paymaster, U. S. Army. The name of the payee, James Barr, had been forged thereon. This forgery was not discovered until July 26, 1879, and on July 31,

1879, without any notice of the forgery having previously been given, action was brought. It was held by Butler, district judge, that the United States could not recover because its failure to give notice and make claim on the defendant amounted to such negligence as would bar a recovery.

This case, like the case of *United States* v. *Cook* (Fed. cases, 14855), rests entirely upon the assumption that it was the duty of the United States to ascertain the fact of the forgery within a reasonable time, but inasmuch as the United States was not required to know the signature of the indorser and no duty therefore rested upon it to exercise any care in ascertaining whether or not the indorsement was a forgery, under the very great weight of authority no negligence can be imputed to it for its failure to do so, and we submit that no weight should be attached to this decision.

In *United States* v. *National Exchange Bank* (45 Fed., 163) the facts were that through a number of letters forged by one Schuman, the father of one Anton Erben was induced to remit by money orders a considerable sum of money to said Erben in care of the German Aid Society, Milwaukee. By further misrepresentations upon the part of Schuman, he obtained possession of the orders and procured one Reuter, who was connected with the aid society, to identify him at the bank as being Erben. Thereupon the bank paid the order upon the indorsement of said Erben forged by Schuman. Some time

afterwards Schuman's fraudulent scheme and his forgery of Erben's name was discovered, and the money was paid Erben by the Post-Office Department, and suit was brought by the United States to recover the sum from the bank.

The case was decided principally upon the ground that, while the order was issued in the name of Anton Erben, it was really issued to Schuman, and that the bank made proper inquiry with reference to whether the person presenting the order was the owner thereof, and therefore was protected by the principle that "Where both are innocent and the loss must fall upon one, it should be upon the one who, in law, most essentially facilitated the fraud," and "Where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with loss in exoneration of the former, or if both are equally innocent and equally ignorant the loss should remain where the chance of business has placed it."

However, it was mentioned, without any extended consideration, that the delay of the Government to give notice for more than a month after the forgery had been ascertained, of its intention to hold the bank liable, was sufficient to defeat its recovery.

In *Gloucester Bank* v. *Salem Bank* (17 Mass., 33) the facts were that the Salem bank held a number of notes which appeared to have been executed by the Gloucester bank. Upon notice given, the Gloucester bank paid said notes, and held them for more than a

month without making any examination to ascertain whether or not they were genuine. The gist of the court's opinion in dismissing the action brought by the Gloucester bank against the Salem bank to recover the amount of the forged notes is contained in the following sentence:

> There was an actual adoption of them by the Gloucester bank as their own notes, through their cashier, who, acting in the course of business intrusted to him, of which paying and receiving notes is a principal part, must be considered as representing the bank in this transaction.

In the case of *Raymond* v. *Baar* (13 Sergeant and Rawles, 318) the plaintiff had received from the defendant a counterfeit $10 note, and held the same for six months. The court below charged the jury that if the defendant had no knowledge that the note was counterfeit the plaintiff was precluded from recovering by holding the note for an unreasonable time without demand on the defendant. It was held by the Supreme Court of Pennsylvania that there was no error in this charge.

The court, among other things, said:

> But in consequence of the plaintiff retaining it (the counterfeit note) so long he has lost all chance of redress, because it would be extremely difficult after the lapse of six months to identify the note or prove from whom it was received.

We insist that the reasons why due diligence should be exercised in giving notice upon the receipt of a counterfeit note do not apply to the present case.

The note by Justice Holmes, found in 3 Kent, 85, to wit,

> The acceptor is held to be at liberty to show a forgery in the body of the paper, and if he has paid the forged amount may recover it back from the person to whom he has paid it, provided he has been guilty of no negligence in failing to detect the forgery and has given notice of the forgery as soon as discovered,

is also cited as authority sustaining defendant's contention. We insist that this note, like the language used in a number of decisions cited by counsel, only emphasizes the fact that money may be recovered when paid upon a forged note, but can not be taken as an authority for the contention that immediate notice must be given upon the discovery of the forgery. It will be observed that it is here stated that recovery may be had in case due diligence is used to ascertain the forgery and notice of the forgery is given when discovered, but it is not said that recovery *will be denied should such notice not be given*, nor do we understand that it was so held in the authorities cited in support of the note above quoted. In fact dependant's contention rests very largely upon authorities which undertake to say that under certain circumstances money paid on forged paper *may* be recovered, but do not lay down a rule as to when money so paid can *not* be recovered.

III.

If the burden rests upon the plaintiff to show that defendant was not placed in a worse position in consequence of its failure to give immediate notice of the discovery of the forgery, which we deny, it clearly appears from the facts that the defendant suffered no injury whatever in consequence of the delay.

It is suggested that although the forger, Munson, was insolvent, yet a criminal prosecution might have induced him or his friends to raise all or a portion of the money paid out by defendant, but, as stated upon page 3 of defendant's brief, Munson was sentenced on June 22, 1898, to imprisonment for the term of five years for these forgeries. This was but a month after some of the forgeries had been detected; and it appears therefore that very prompt action was brought against Munson, and that if any part of the money lost could have been by this means wrung from him or his friends, it would have been done.

It is certain, under this record, that the defendant bank suffered no damage whatever and was not injured in the least in consequence of the delay of from two to five months in giving it notice of the various forgeries in question.

It is insisted that if the checks in question are not negotiable instruments in the strict sense of that term, yet the same rule applies with reference to

requiring notice in case of payment on a forged indorsement.

We insist that the authorities cited upon this point do not sustain counsel's contention. In the case of *Wall* v. *County of Monroe* (103 U. S., 74), which is cited in support of this proposition, the court held that county warrants—

> being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee.

To the same effect see *Watson* v. *City of Huron* (97 Fed., 449).

Furthermore, it was conceded, in the opinion of the majority in the court below, that the principle that immediate notice was necessary would not apply in case the checks in question were not strictly negotiable instruments. They, in fact, would be controlled by the same principles that apply to a claim for damages or to any personal chattel.

V.

We wish to emphasize the point presented in our former brief—that even though an ordinary individual would be barred from recovery in consequence of the

failure to give immediate notice upon the discovery of the forgery, yet this principle can not apply to the Government.

As we understand, practically all authorities agree that the bar is created by the negligence of the party who pays the money upon the forged indorsement. As pointed out in said brief, this principle is entirely distinct from the principle which requires notice of nonpayment or dishonor of a check, draft or note, to be given upon the day of such dishonor; such notice being in that case a part of the contract between the various parties, and therefore an essential prerequisite of the right of action. In such a case the Government would necessarily be bound as any other individual; but we respectfully submit that negligence can not be imputed to the Government, and that therefore a right of action which otherwise exists in the Government can not be defeated by a mere act of negligence upon the part of one of its officers.

J. A. FOWLER,
Assistant Attorney-General.

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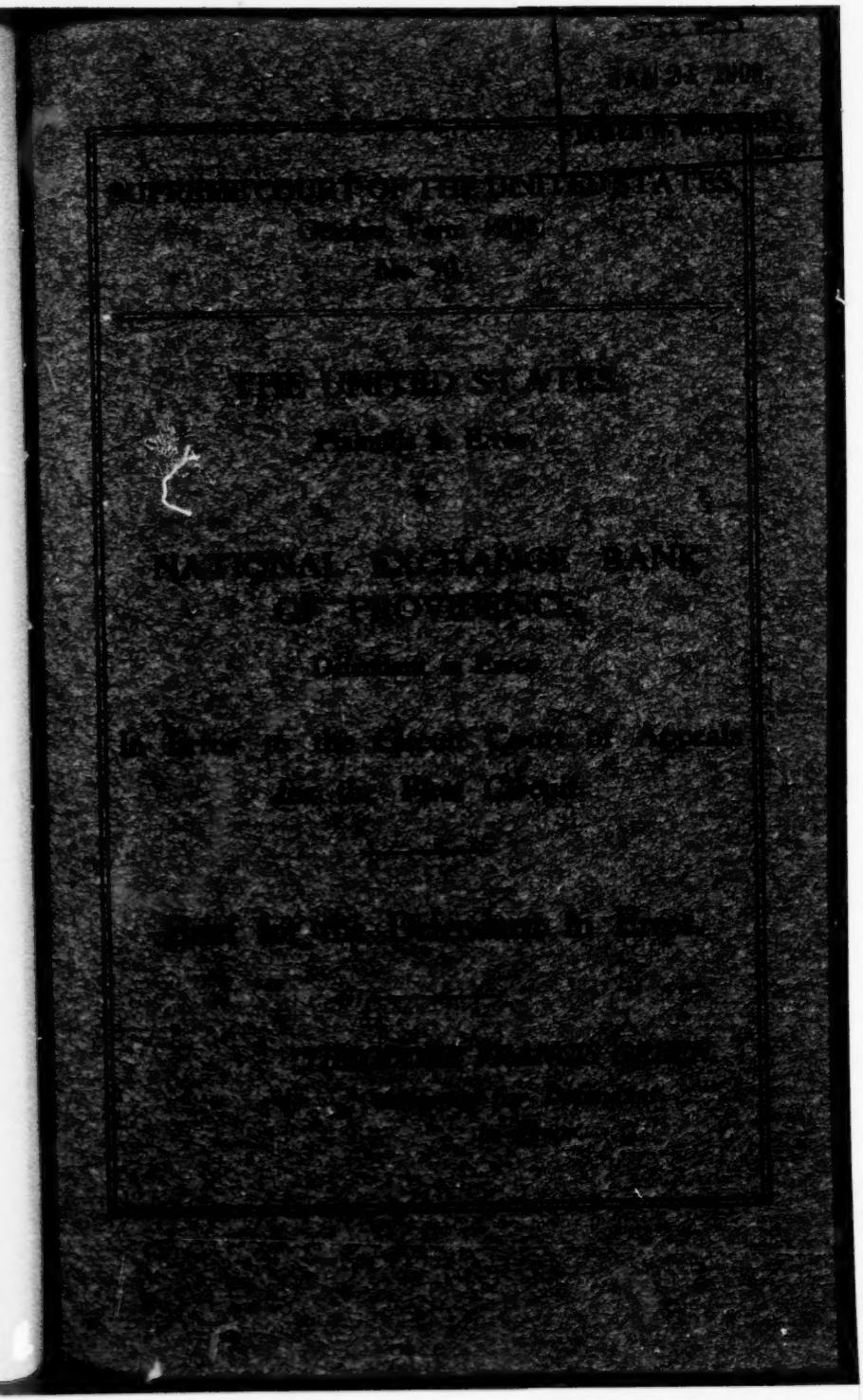

SUPREME COURT OF THE UNITED STATES

October Term 1908.

No. 90.

THE UNITED STATES,

Plaintiffs in Error,

v.

NATIONAL EXCHANGE BANK OF PROVIDENCE,

Defendant in Error.

Brief for the Defendant in Error.

STATEMENT OF CASE.

This is an action at law, brought in the Circuit Court for the District of Massachusetts by the United States against the National Exchange Bank of Providence. Jury trial in that court was waived, and the case was tried on an agreed statement of facts.*

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* The National Exchange Bank of Boston was originally the defendant (Record, p. 4). The writ was amended by agreement by substituting the National Exchange Bank of Providence for the National Ex-

The purpose of the suit was to recover back money paid by the plaintiffs to the defendant upon a large number of pension checks bearing forged indorsements. By the agreed statement it appears that the checks were issued quarterly by the United States pension agent at Boston, from 1886 to 1897, both inclusive. Some of the persons to whose order the checks were drawn were at the time dead; others were remarried widows not entitled to a pension. One Munson became possessed of the checks upon their issue and forged thereon the indorsements of the respective payees. They were all cashed in good faith by the defendant in error, which was also the original defendant herein; but the precise circumstances under which they were cashed does not appear. The checks were forwarded to a Boston bank for collection and all paid in regular course at the Sub-Treasury in Boston. On June 18, 1897, the special examiner of the Pension Bureau reported to the Bureau that the indorsements of three of the checks in suit, drawn payable to Leonard J. A. Mooy, were probably forged by Munson. On December 18, 1897, notice of these forgeries was given to the defendant by the United States Attorney at Providence, and the defendant was informed that at a proper time reclamation would be made upon it. At

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change Bank of Boston (Record, p. 8). Judgment was entered by agreement for the National Exchange Bank of Boston (Record, p. 9), so that the case stands as if originally brought against the National Exchange Bank of Providence.

various dates between February 19 and May 28, 1898, the indorsements upon the other checks were discovered to be forgeries. On June 22, 1898, Munson was sentenced for the forgeries to imprisonment in the Rhode Island State Prison for the term of five years. He later died in prison, having made a deposition which is printed in the Record as a matter of reference, the making of which is admitted, but not the truth of the facts deposed. On July 22, 1898, the United States Attorney made demand upon the defendant for a return of the money paid on the latter checks except ten of those payable to Mary Shambell, and three of those payable to Susan A. Lake, with respect to which no notice was given prior to the beginning of this action. The defendant did not return the money received on the checks, and this suit was instituted August 27, 1901. (See Agreed Statement of Facts, Record p. 10).

The general form of each of the checks is shown by the following sample:

" UNITED STATES PENSION AGENCY, No. 297073
" BOSTON, MASS., March 5, 1892
" ASSISTANT TREASURER OF THE UNITED STATES

" *Boston, Mass.*
" *Pay to the order of Mahala B. Jacques* 9492 B81
" *Thirty-six* $\frac{00}{100}$ *Dollars* $36
" $36 Interior
" *W. H. Osborne*
" *U. S. Pension Agent.*

"Paid Mar. 12, 1892
"Asst. Treas., *Boston.*

"INDORSEMENTS:

"Mahala B. Jacques
"*Payee*
"M. M. Angell

"Pay Nat. Bank of the Republic, Boston or order, for collection, for account of First National Bank, Providence, R. I.
"C. E. LAPHAM,
"Cashier

"INDORSEMENT GUARANTEED
"Nat'l Bank of the Republic, Boston" (Record p. 36.)

On these facts the Circuit Court held that the plaintiffs might recover on all of the checks with interest from the date of the demand (Record pp. 15–16, 22).

In the Circuit Court of Appeals the decision of the Circuit Court was held to be error, on the ground that the regular rule requiring prompt notice to be given of the discovery of a forged indorsement of commercial paper in order to recover from one in good faith receiving money thereon applied in this case, and that the delay of the plaintiffs in giving such notice was unreasonable.

The judgment of the Circuit Court was accordingly reversed and the case ordered remanded with directions to enter judgment for the defendant (Record pp. 36–42).

The case is now before this Court on the plaintiffs'

petition for a writ of error to the Circuit Court of Appeals.

* * * * * * * *

Although the petition for the writ of error filed by the plaintiffs in error stated that the assignment of errors was filed therewith, it appears of record that although the writ issued May 10, 1907, no assignment of errors was filed until on or about October 23, 1908,—so near the time when the hearing was expected that it was found impracticable to change the form of the defendant's brief, which was then substantially ready for the printer. This may explain any change in the order of treatment between the plaintiffs' assignment of errors and the defendant's brief.

For the convenience of the Court reference is here made to the various headings in the brief under which the respective assignments of error are discussed.

Assignment of error number	Brief for defendant in error
1	Part 1—I, II. (pp. 17, 19) Part 2—I, II. (pp. 45, 53) Part 3—I, II. (pp. 56, 58)
2	Part 1—I, II. (pp. 17, 19) Part 2—I, II. (pp. 45, 53) Part 3—I, II. (pp. 56, 58)
3	Part 1—III. (p. 35)
4	Part 1—IV, V. (pp. 38, 44)
5	Part 2—I, II. (pp. 45, 53)
6	Part 3—I, II. (pp. 56, 58)
7	Part 1—IV, V. (pp. 38, 44)
8	Part 2—I, II. (pp. 45, 53)
9	Brief as a whole.

ANALYSIS OF ARGUMENT.

The argument of the defendant may be summarized under the following heads:

INTRODUCTION.

DISCUSSING MISCELLANEOUS CLAIMS HITHERTO MADE BY THE PLAINTIFFS.

1.— The bank is not concluded by the fact that it cashed the checks.

2.— The bank by presentment did not warrant genuineness.

3.— The hardship is not on the United States more than on the bank.

A.— MUTUAL MISTAKE IS NOT ALWAYS CONCLUSIVE.

B.— THE EQUITIES ARE EQUAL AND THE BANK HAS TITLE.

CONSTRUCTIVE ARGUMENT.

PART I.

I.— In case of payment under a forged indorsement of commercial paper, the plaintiff, in order to re-

cover, must have given notice of the forgery within a reasonable time after payment.

A.— AN UNREASONABLE TIME ELAPSED IN THIS CASE.

II.— In case of payment as above, the plaintiff, to recover, must at least have given notice of the forgery within a reasonable time after its discovery.

A.— AUTHORITIES REFUSING RECOVERY ON THIS GROUND CITED.

B.— AUTHORITIES ALLOWING RECOVERY WHERE PROMPT NOTICE GIVEN, DISTINGUISHED.

C.— AUTHORITIES CONTRA ANALYZED.

III.— The plaintiffs did not give the defendant notice of the forgery within a reasonable time after its discovery.

A.— UNDER GENERAL RULE.

B.— SPECIAL RULE UNDESIRABLE.

IV.— Proof of damage by the delay in giving notice is not necessary.

V.— If evidence of damage by delay is relevant, the burden of proof is on the *plaintiffs* to show absence of damage by the delay.

PART II.

I.— Pension checks are commercial paper.

II.— If pension checks are not in every respect to be treated as commercial paper, they are to be so treated to the extent that the same rule requiring prompt notice should be applied.

PART III.

I.— That the United States are parties plaintiff in this action is immaterial.

A.— As a party to such paper the United States stands in the position of any other litigant.

B.— The government may accordingly be bound by negligence of its agents in giving notice of the discovery of a forgery.

II.— The United States cannot properly claim that it was outside the domain of commerce so as to avoid the application of *Cooke* v. *United States*.

ARGUMENT.

The decision of the Circuit Court of Appeals was not error.

INTRODUCTION.

DISCUSSING MISCELLANEOUS CLAIMS HITHERTO MADE BY THE PLAINTIFFS.

Before presenting the real argument on behalf of the defendant, certain contentions which the plaintiffs made in the court of appeals, and which will probably be repeated here may properly be answered.

(1) The plaintiffs claimed that whatever otherwise might be the bank's rights, it is concluded by the fact that it made the first mistake in cashing the checks in suit.

In answer it should be noted, first, that so far as appears from the agreed statement of facts, the bank is not shown to have acted negligently in making the payments. (Record p. 11.) Nothing is set forth therein to show the circumstances under which the checks were cashed, and inasmuch as the bank, on the facts as set forth, may have acted with the utmost caution, the Court cannot presume that it acted without due care; indeed, the Court should rather presume that the transaction was conducted with the care usually exercised by banks under similar circumstances. It follows that those cases are not even in point in which the view has been taken that a negligent purchase of forged paper will render a bank liable to refund money received in retiring the same. And that the view itself is wrong, see

Salt Springs Bank v. *Syracuse Savings Institution*, 62 Barb. (N. Y.) 101,

where a bank cashed a forged check on a sister bank, which the latter honored. In a suit by the latter to recover the money, the Court say at p. 107:

> "It is not shown that the defendant is prohibited by a law of the State, or by its charter, from advancing the money on a check, for the accommodation of a stranger; and unless forbidden, it had the same right to take the check that an individual would have. The defendant owed the plaintiff no duty, imposed by custom or otherwise, to inquire into the genuineness of the check. It had the right to take the risk of advancing money upon it if it was forged, or if, for any other sufficient reason, the bank was justified in refusing to pay it. The plaintiff's counter was the proper place at which to ascertain whether the check was genuine."

It is to be noted secondly that the plaintiffs were not properly careful to prevent loss. They had on file authentic signatures of all the parties whose names were forged. (Record p. 10.) Yet, during periods ranging in the majority of instances from three to nine years they continued to cash checks bearing the forged indorsements of the respective pensioners. (Record pp. 18, 20.) The care actually used by the plaintiffs contrasts strongly with that required of others in the same connection — for the voucher sent out with each check required that the pensioner's signature "must be written

letter for letter as it is written in the pension certificate," that the magistrate taking the acknowledgment "must carefully compare this voucher with the pension certificate" and that the clerk of the court must certify that the magistrate's "signature within written is genuine." (Record pp. 10, 27, 28.) The facts which would have led to discovery of the forgeries were in the hands of the Government; and it cannot escape on the ground of lack of facilities for conducting an investigation, for the Revised Statutes provide that, "The Commissioner of Pensions is authorized to detail, from time to time, clerks in his office to investigate suspected attempts at fraud on the Government, through and by virtue of the provisions of the pension laws." R. S. Title LVII. § 4744. Under such circumstances if there is to be any contention as to either party's being concluded by mistake or carelessness there is rather ground for contending that by cashing the checks without objecting within a reasonable time, the Government negligently led the bank to believe the signatures genuiue, so that it could not question them in later transactions. Indeed such acquiescence might perhaps be held to prevent the United States from afterwards disputing their authenticity within the principle of,

> *Leather Manufacturers Bank* v. *Morgan*, 117 U. S. 96, 112,

in which this Court in holding that a depositor could not recover money paid out by his bank on forgeries of

his name which would have been discovered if he had examined his returned checks with proper care, said, at p. 112,

> "Where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth — which he has the means, by ordinary diligence, of ascertaining — and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct."

And see,

> *Howard & Preston* v. *Mississippi Bank*, 28 La. Ann. 727;

See also

> *Wood* v. *Carpenter*, 101 U. S. 135, 140,

holding that if one have the means of discovering a fraud in his power, he will be held to have known it.

(2) The plaintiffs also claimed that the presentment of the checks by the bank for payment implied a warranty of genuineness, and argued that such warranty lulled them into a false security.

There is some judicial sanction for the proposition of

law here involved, but so far as known, expressions countenancing it were not necessary to the decision of any case on which it is based. Mr. Daniel in his text-book goes so far as to say outright that a presenter for payment represents that he holds the bill of the drawer, and demands its acceptance or payment as such. A comprehensive and scholarly answer to his statement is that of James Barr Ames in 4 Harv. L. Rev. 301, who says,

> " One who transfers a bill or any chattel, whether by way of sale or in payment of a debt, does indeed represent that the thing sold or exchanged is his and also what it purports to be. To use the common expression, he impliedly warrants his title and the genuineness of the thing transferred. Accordingly, if it is not genuine, the vendee may recover his purchase money or the creditor may treat his debt as still unpaid. But the attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainor. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He in effect says, 'Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment.' . . . The so called indorsement is not an indorsement at all, but simply a receipt of payment."

The position of Dean Ames is sustained by the following cases:

East India Co. v. *Tritton*, 3 B. & C. 280, 289, 290, 291 (Bayley, J.).
Wilkinson v. *Johnson*, Ib. 428.
Dedham National Bank v. *Everett National Bank*, 177 Mass. 392.
Bernheimer v. *Marshall*, 2 Minn. 78, 84.
Bank of St. Albans v. *Farmers' Bank*, 10 Vt. 141, 145, 146.
STORY, PROMISSORY NOTES, 7 Ed. 526, n. 1.

And see

Goetz v. *Bank of Kansas City*, 119 U. S. 551, 555.
Leather v. *Simpson*, L. R. 11 Eq. Cas. 398.
Corporation of Sheffield v. *Barclay* (1903), 2 K. B. 580.

Such must also be the law under the numerous cases cited *infra* in which recovery was not allowed on account of delay in giving notice of the forgery. If there had been a warranty, the delay would have been irrelevant.

In connection with the above, attention should be given to the fact stated by Mr. Justice Putnam in the court below (Record p. 37), that "no indorsement by the Exchange Bank appears on the sample shown in the record, and whatever indorsement there is is simply 'for collection.'"

(3) Much was made in the Court of Appeals of the argument that the bank had the use, without interest,

of a large sum belonging to the Government for a long period, and that the bank is unjustly enriching itself by witholding the funds of the United States. Such an argument is obviously specious. The question to be determined is precisely whether the money *is* the money of the Government, and the defendant in error submits that on this point of the case the Court is to decide which of two innocent parties is to bear a loss, and not whether the bank must give up an unjust increase in its assets. To the argument of hardship on the Government, may be opposed that of exactly equal hardship on the bank if it must refund. The merit of the parties, for this purpose, is equal; technically put, they have equal equities; but the defendant has the legal title, i. e., to the money. The result of a judgment against the bank would be merely to shift—not to reduce or destroy the hardship.

The confident and sweeping assertion is made by the plaintiffs that it is a sufficient answer to the defendant's position to offer the general principle that "money paid under a mutual mistake of fact may be recovered." This assertion will be found, upon analysis, not to be adequate; unless the principle be stated fully by adding the qualification "if the retention of the money by the defendant is inequitable, i. e., unconscionable." An indefinite number of cases, all of unquestioned authority, might be cited to show that the mere circumstance that the plaintiff paid and the defendant received money under a material mistake of fact gives no absolute right to recover. Two or three instances will suffice.

(a) *Price* v. *Neal*, 3 Burr 1354.

Here a drawee paid an indorsee, both believing the draft genuine. In fact it was forged. Held: no recovery. This case is followed almost without exception throughout the United States, in England, and all over the continent of Europe. (See analysis by J. B. Ames in 4 Harv. L. Rev. 297.)

(b) *Hoffman & Company* v. *Bank of Milwaukee*, 12 Wall. (U. S.) 181.
Goetz v. *Bank of Kansas City*, 119 U. S. 551.

Here a drawee paid an indorsee, both believing that attached bills of lading were genuine. In fact they were forged. Held: no recovery.

On the same facts, in

First National Bank of Detroit v. *Burkham*, 32 Mich. 328,

Cooley, J., said, p. 331:

> "The best view that can be taken of this case for the plaintiffs below is, that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually when one of two parties equally innocent must suffer, the law leaves the loss where it has chanced to fall."

(c) *Merchants Insurance Co. of Providence* v. *Abbott*, 131 Mass. 397.

Here the insured fraudulently burned his building and assigned the insurance to the defendant, who collected the insurance in good faith from the plaintiff. Held: no recovery.

Nor does it matter whether defendant in taking his title gave his consideration to the plaintiff or to a third person, if he acted in good faith.

Judson v. *Corcoran*, 17 How. (U. S.) 612.

The case has been followed on the precise point involved in at least nine other cases in the federal courts.

CONSTRUCTIVE ARGUMENT.

I.

In case of a payment under a forged indorsement of commercial paper, the plaintiff, in order to recover, must have given notice of the forgery within a reasonable time after payment.

The above proposition of law is clearly the rule in England.

Cocks v. *Masterman*, 9 B. & C. 902 (1829).

The plaintiff, A's banker, paid the defendant a draft upon which A's acceptance was forged. The next day the forgery was discovered, and the same day the defendant was notified. The plaintiff was not allowed to recover, on the ground that the defendant was entitled to know on the due day whether the bill was a dishonored bill. The parties paying "ought not by their negligence to deprive the holder of any right or privilege" (p. 909).

Accord,

> *Mather* v. *Lord Maidstone*, 18 C. B. 273, 294.
> *Wilkinson* v. *Johnson*, 3 B. & C. 428 (*semble*).
> *Smith* v. *Mercer*, 6 Taunt. 76.

To the same effect in general, see

> *Bloomer* v. *Spittle*, L. R. 13 Eq. 427 (1872).
> 2 PARSONS, NOTES AND BILLS, 598.

In the United States Federal Courts also, a high degree of diligence has been required.

> *United States* v. *Cooke*, Fed. Cas. 14,855 (Dist. Ct., E. D. Pa., Cadwalader, J., 1871).

The court said,

> "It was only necessary to say that the delay of more than six years which had elapsed was fatal to the claim of the United States,—that all the cases

require the utmost diligence on the part of the drawee,—a diligence analagous to that required in giving notice of the dishonor of commercial paper."

United States Bank v. *Bank of Georgia.* 10 Wheat. (U. S.) 333.

The plaintiff for sixteen days negligently failed to discover the forgery of its president's name on its bills paid to it by the defendant, but gave notice immediately upon its discovery. In an elaborate opinion by Judge Story the delay was held fatal, and the payment was pronounced valid.

A.— AN UNREASONABLE TIME ELAPSED IN THIS CASE.

Within the rule of the above cases an unreasonable time elapsed between the payment of the checks in this case, and the notice to the defendant of the forgery. The period varied from eighteen months, in the case of the Mooy checks to over eleven years in one instance, and averaged from two to five or six years. (List of checks, Record, pp. 18, 20, Letters of district attorney, Record, pp. 11, 12.)

II.

In case of a payment under a forged indorsement of commercial paper, the plaintiff, to recover,

must have given notice of the forgery within a reasonable time after its discovery.

(A) — All of the cases cited under the last preceding heading apply also to this point. If notice of the forgery must be given within a reasonable time after the payment, *à fortiori* it must be given within a reasonable time after the discovery of the fraud.

A number of American cases refuse to go to the length of the rule as laid down under the first proposition, but except in the rarest instances, they have all refused recovery unless the utmost diligence was used after the forgery came to light.

It is submitted that the rule is just. As said by Mr. Justice Story in *United States Bank* v. *Bank of Georgia*, *supra*, p. 344.

> " If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach ; and therefore, to confine the remedy to cases of that sort, would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt,

there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility."

The last proposition is stated by Mr. Justice Putnam, in the court below, to be "thoroughly settled as a principle of law in the United States." (Record, p. 38.) That he was justified in this statement appears from the following cases:

United States v. *Clinton National Bank*, 28 Fed. Rep. 357.

It was there stated by Mr. Justice Brewer that the principle that it is necessary "that the maker, acceptor, or other party who demands restitution of money paid under a forged signature of the drawer of a bill should make the demand without unnecessary delay," is "sustained by the common voice of the authorities."

United States v. *Central National Bank of Philadelphia*, 6 Fed. Rep. 134.

Money was paid under a forged indorsement, but no notice was given prior to bringing suit. Judgment was given for the defendant by Justices Butler, Cadwalader and McKennan.

United States v. *Cooke*, Fed. Cas. 14,855.

A delay of more than six years after making a payment under a forged indorsement was held to be fatal to recovery.

United States v. *National Exchange Bank*, 45 Fed. Rep. 163.

About March 11, 1890, the plaintiffs discovered that they had made a payment under a certain forged indorsement. Notice was given the defendant April 17th. The Court said

> "This was, within all the cases, an unreasonable time to wait. The notice should have been given without unnecessary delay after discovery of the fraud to enable the bank to pursue any remedy it might have against the forger or indorsers."

The President, etc., of the Gloucester Bank v. *President, etc., of the Salem Bank*, 17 Mass. 33.

The plaintiff failed for over a month to give the defendant notice of a forgery under which it had paid the defendant. It was held that the plaintiff had lost its right to recover, and the Court said,

> "The question in this case is, whether, as between these parties equally innocent and ignorant, the loss shall remain where the chance of business has placed it, or shall be shifted back upon the

Salem Bank, who may be considered as having, by good fortune, rid themselves of it."

Raymond v. *Baar*, 13 Serg. & Rawle (Pa.) 318.

A delay of six months in giving notice of a forgery of a draft was held "most unreasonable negligence. It was his (the plaintiff's) duty to return it to the defendant as soon as he discovered it to be counterfeit. . . . It is what is termed in law *crassa negligentia*, gross negligence, and he ought to suffer for it."

3 KENT'S COM. 12 Ed. 108, *85 (note, per Mr. Justice Holmes).

"The acceptor is held to be at liberty to show a forgery in the body of the paper, and if he has paid the forged amount, may recover it back from the person to whom he has paid it, provided he has been guilty of no negligence in failing to detect the forgery, and has given notice of the forgery as soon as discovered."

3 KENT'S COM. 12 Ed. 111, *86, Note B.

"None but the payee can assert any title to a negotiable bill or note without his endorsement, but the loser cannot recover back, unless he uses diligence to detect the forgery, and give notice, and there be no unreasonable delay after the discovery of the forgery."

Daniel on NEGOTIABLE INSTRUMENTS, 5th Ed. §1371.

"It is undoubtedly necessary that the maker, acceptor, or other party who demands a restitution of money paid under a forged endorsement or under a forged signature of the drawer of a bill, should make the demand without unreasonable delay."

(B)—A number of cases allowing recovery of money paid under a forged indorsement will be found to conform to the rule that notice must be given within a reasonable time. Several, indeed, expressly recognize the correctness of the principle.

Canal Bank v. *Bank of Albany*, 1 Hill. (N. Y.) 287.

Here the Court held that while the lapse of time in discovering the forgery is in the abstract unimportant, there must be reasonable diligence in giving notice, after a discovery of the forgery.

Bank of Commerce v. *Union Bank*, 3 Comst. (N. Y.) 230.

Delay was held not necessarily fatal, "provided notice of the forgery be given as soon as it is discovered."

Ellis & Norton v. *Ohio, etc., Co.*, 4 Oh. St. 628, 657,

The Court said,

> "When money is thus paid upon a forgery, it is sufficient to give notice, without unreasonable delay after the forgery is discovered."

Bank of Commerce v. *Union Bank*, 3 Comst. (N. Y.) 230.

The plaintiff was allowed to recover, having given notice of the forgery immediately upon its discovery. At page 237 the Court said,

> "In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill, is excused, provided notice of the forgery be given as soon as it is discovered."

Frank v. *Lanier*, 91 N. Y. 112.

Delay in discovering the forgery was held not to be fatal, as notice was given within a reasonable time thereafter (in this case within twelve hours).

United States v. *National Bank of the Republic*, 2 Mack. (Dist. of Col.) 289.

The forgery of the indorsement was discovered in three years and the defendant was notified within six

days thereafter and furnished with all proofs of the forgery by the Government. It was held that the notice was reasonably prompt and the plaintiff might recover.

Merchants Bank v. *Marine Bank*, 3 Gill. (Md.) 96.

In this case notice was given on the very day of the discovery of the forgery and a return of the money was demanded (see page 98).

Goddard v. *Merchants Bank*, 4 N. Y. (4 Comstock) 147 (Affirmed, same v. same, 2 Sandf. (N. Y.) 147).

It appeared that on discovery of the forgery "notice was immediately given to the defendants and repayment of the money demanded, which they refused" (see page 148).

Star Fire Insurance Company v. *New Hampshire National Bank*, 60 N. H. 442, 443.

"Immediately on discovery of the forgery the plaintiffs notified the defendants, presented the draft, and demanded repayment of the money paid upon it."

McCall v. *Corning*, 3 La. Ann. 409.

Notice of the forgery was given forthwith — as soon as the forgery was discovered.

Wilkinson v. *Johnson*, 3 B. & C., 428.

The plaintiff gave the defendart immediate notice of a forged indorsement. It was held that he might recover.

Ellis & Morton v. *Ohio Insurance & Trust Company*, 4 Oh. State, 628.

The plaintiff, suing to recover money paid on its forged check, was held to have been improperly nonsuited. The fraud was discovered within ten days of the payment and notice was given forthwith upon discovery (see page 649).

Carpenter v. *Northborough National Bank*, 123 Mass. 66.

The plaintiff was allowed to recover under these circumstances: "The note was soon after shown to William Carpenter who pronouncedhis signature a forgery. The plaintiffs thereupon notified the defendant" of the forgery, etc.

If the Court should believe that the last group of cases (cited under B) were correctly decided in spite of

the lapse of time between the payment and the notice, they are still entirely consistent with the proposition that the Government is barred, if not by the failure to discover the fraud, at least by failure to give notice of its discovery. In the cases allowing recovery the defense of the holders was [redacted] the failure of the banks to give notice of the discovery of the fraud, [redacted]. The negligence in the former case relates to preventive measures, in the latter to curative measures; in the former it is unconscious, in the latter conscious; in the former neither party thinks of fraud or loss, in the latter one party knows that fraud has been committed and that loss must fall either on himself or on the other unless he gives prompt notice, and, notwithstanding this knowledge, neglects to give such notice.

(C)—The Government contends that the true rule is, not that notice of a forgery must be given within a reasonable time of its discovery, but that the plaintiff may recover, no matter how long the delay, provided that it does not affirmatively appear that the defendant has suffered actual damage thereby.

That rule is laid down in a small number of cases, but it will be found upon analysis that in most of them notice of the forgery was in fact given shortly after its discovery, so that it was not necessary for the Court to decide that unreasonable delay in giving notice was not fatal. For example in,

United States v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259 (Affirmed, same v. same, 64 Fed. Rep. 703),

the forgery was discovered in two years, but notice was given to the defendant within three days thereafter. It was held that the plaintiff might recover.

Oppenheim v. *West Side Bank*, 50 N. Y. Supp. 148, 152.

The Court's statement of the proposition relied upon by the plaintiffs in this case was dictum, as in fact the indorsee under the forged endorsement was notified personally on the very day of the discovery of the forgery, and received formal written notice three days thereafter.

Mr. Daniel, 5th Ed. § 1372, expresses some leaning toward the plaintiffs' position, saying: "But there is high authority for the more liberal, and we think, wiser and juster doctrine,"— that is, the doctrine claimed by the plaintiffs. This, however, as stated by Mr. Justice Putnam in the court below, "so far from denying the established rule, admits it, and only takes cognizance of some supposed expressions the other way." All of Mr. Daniel's citations in support of his suggestion have been examined, and they fail to support it. They are as follows:

2 PARSONS, NOTES AND BILLS, 2d. Ed. 298.

This citation apparently recognizes the reasonable time rule and approves several decisions, in one of which "a considerable delay" was held fatal; in another seven days was held fatal; in another a fortnight; in another eighteen days; in another ten days; and in another fifteen days.

Third National Bank v. *Allen*, 59 Mo. 310.

The plaintiff learned of the forgery the day after the payment and notified the defendant that day or the day following. The Court held that notice was given within a reasonable time, which was all that was required.

Koontz v. *Central National Bank, etc.*, 51 Mo. 275.

It does not appear that there was any delay in notifying the defendant of the forgery.

White v. *Continental National Bank*, 64 N. Y. 316.

In this case it was expressly stated that the plaintiff gave the defendant notice immediately upon discovery of the forgery.

Welch v. *Goodwin*, 123 Mass. 71.

It was stated at page 71 that notice was given immediately upon discovering the forgery and at page 78

the Court expressly laid out of consideration the question now being discussed.

> *First National Bank of Crawfordsville* v. *First National Bank of Lafayette*, 4 Ind. App. 355.

The plaintiff expressly averred that he gave notice immediately upon discovering the forgery.

> *First National Bank of Chicago* v. *Northwestern National Bank of Chicago*, 152 Ill. 296.

The Court stated that the acceptor might recover money paid provided demand was made within a reasonable time after discovering the forgery. In this case less than one business day elapsed.

> *Canal Bank* v. *Bank of Albany*, 1 Hill. (N. Y.) 287, 291.

This case dealt solely with delay in discovering the forgery and expressly laid out of consideration delay in giving notice thereafter.

Upon one authority, however, more than any other, the counsel for the plaintiffs pin their faith; and it is also strongly relied upon by Mr. Justice Aldrich in his dissenting opinion in the court below. That case is

United States v. *National Park Bank of New York*, 6 Fed. Rep. 852,

decided by Choate, J., in the District Court for the Southern District of New York in 1881. In this case one Dunlap received from a United States Paymaster a draft on the Assistant Treasurer at New York. It came to the defendant through a bank for collection, Dunlap's endorsement being forged. The defendant collected it and credited its correspondent. Ten years later the plaintiffs discovered the forgery and neglected to notify the defendant for one year thereafter. It was held that the defendant was liable for the money in the absence of proof of damage by the delay; and the Court said that negligence in notification without damage is no defense, distinguishing the case of counterfeit money on the ground that there, failure to give notice would necessarily prejudice the defendant as he would be unable to trace it.

In dealing with this decision, it is only to be said that it was apparently a case of first impression, and that it is contrary to and irreconcilable with the whole course of authority.

In support of his main position Judge Choate cites nine cases, no one of which supports him. They are as follows:

(1) *Kingston Bank* v. *Eltinge*, 40 N. Y. 391.
(2) *Meyer* v. *The Mayor, etc., of New York*, 63 N. Y. 455.

(3) *Pardee* v. *Fish*, 60 N. Y. 265.
(4) *Union National Bank of Troy* v. *Sixth National Bank of New York*, 43 N. Y. 452, 456.
(5) *Allen* v. *Fourth National Bank*, 59 N. Y. 12.
(6) *National Bank of Commerce* v. *National Merchants Bank, etc.*, 55 N. Y. 211.
(7) *Continental National Bank* v. *National Bank of Commonwealth*, 50 N. Y. 575.
(8) *United States* v. *Union National Bank*, Fed. Cas. 16,597 (Affirmed, 16,596).
(9) *Welch* v. *Goodwin*, 123 Mass. 71.

In the first case it was held that the owner of a judgment upon which an execution had been issued and a sale of property made, might maintain an action to recover back the money received by the sheriff thereunder from one to whom it had been paid with such owner's consent, under a mistake of fact. No question of negotiable paper was involved.

In the second, the plaintiff, owning a lot in the City of New York and intending to pay an assessment thereon, by mistake paid an assessment on the lot of another. In a suit by him to recover back the money, it was held that in the absence of evidence showing that the city could not be restored to its original position upon repayment, the plaintiff might recover.

In the third, there was no question of any forgery but there was some delay in presenting for payment a negotiable certificate of deposit issued by a bank, payable on demand. It was held that the delay did not discharge the indorser.

In the fourth, there was no question of forgery of negotiable paper, but a payment of money was made under a mistake of fact. No question of unreasonable delay was involved.

In the fifth, the plaintiff was allowed to recover a payment made on a forged certificate of deposit. It appeared (page 19) that notice was given on the evening of the discovery of the forgery.

In the sixth it was held that a payment made by a bank on the raised check of another bank might be recovered, in the absence of proof of damage. At page 217 the Court said, "Delay in discovering and giving notice of the mistake is complained of, but the evidence shows that notice was given immediately on the discovery of the mistake" . . .

In the seventh, it was held merely that where a bank negligently certifies a check to the damage of an innocent party relying thereon, the bank is bound thereby.

In the eighth, it was held that where the United States discovered a mistake in making a payment of money, but neglected to give notice until the defendant lost his remedy over, they cannot recover. No other facts were stated, but the opinion, which was written by Mr. Justice Choate himself, assumed, as a matter of course, that in case of a payment of money under a mistake of fact, there arose "a duty of promptly notifying the defendant on discovery of the mistake."

In the ninth, as above stated in discussing Mr. Daniel's position, notice was given immediately upon discovery of the forgery, and the Court expressly refused to consider the question here involved.

Mr. Justice Choate admitted that the first seven of the cases above cited applied rather to negligence in making payment and discovering the mistake, than to delay in giving notice of for discovery, but considered that the same principle might apply in the latter case.

The other cases cited in his opinion dealt with the rights of one making a payment upon counterfeit currency, and held that in such a case, delay in giving notice of the forgery after its discovery would be fatal. The Court sought to distinguish those cases on the ground that there, immediate notice was necessary to enable the party defrauded to pursue his remedy against the party uttering the counterfeit instrument. It is believed that Judge Choate's distinction between forged and counterfeit paper is untenable. It is quite as important to the party receiving the money to have proper notice in one case as in the other, in order to take effective measures to protect his interests.

It is not unworthy of notice that the case is open to attack also on quite another ground, i. e., because it allows the recovery from an agent of money paid by it in good faith to its principal.

Cf. *Wells, Fargo & Co.* v. *United States*, 45 Fed. Rep. 337, 340.

III.

The plaintiffs did not give the defendant notice

of the forgery within a reasonable time after its discovery.

A.— UNDER GENERAL RULE.

Supposing the defendant's last position to be conceded, was notice given within a reasonable time? From the statement of facts it appears that the forgery of the Mooy checks was discovered June 18, 1897, and notice was given to the defendant December 18, 1897. (Record, page 11.) The forgery of the other checks, except thirteen of those drawn payable to Mary Shambell and Susan A. Lake, was discovered between February 19, 1898, and May 29, 1898. (Record, page 12.) Notice thereof was given to the defendant July 22d, 1898. (Record, p. 12.)

The forgeries of thirteen checks drawn payable to Mary Shambell and Susan A. Lake were discovered May 21, 1898, and May 28, 1898, but no notice thereof was given until the commencement of suit on August 27, 1901. (Record, p. 12). The respective delays, then, may be summarized as follows:

Mooy checks 6 months.

Majority of checks 1 month and 25 days to 5 months and 3 days.

Thirteen Shambell and Lake checks 3 years and 3 months (approximately).

It is submitted that under all the authorities previously cited, the delay in each of the above instances was fatal. With the single exception of Judge Choate's

decision in *United States* v. *National Park Bank of New York*, *supra*, not a case can be found in which recovery was allowed after so long a delay in giving notice as occurred in all of the above instances in this case, and in many of the cases it was expressly decided that a much shorter delay would bar recovery.

B.—SPECIAL RULE UNDESIRABLE.

Nor would it be well to make a special rule for any case with regard to the length of time to be deemed reasonable. The rights of parties to commercial paper have been and ought to remain absolutely fixed; and the courts have always been extremely reluctant to depart from regular rules of decision where such paper is involved. The doctrine of *stare decisis* is here of the utmost importance in order that business men may know where they stand.

In

> *United States* v. *Bank of the Metropolis*, 15 Pet. (U. S.) 377, 392,

it was well said, quoting an earlier case,

> "'The liability of parties to a bill of exchange or promissory note has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions and

cannot now be departed from.' From the daily and unavoidable use of commercial paper by the United States they are as much interested as the community at large can be in maintaining these principles."

And in

First National Bank of Detroit v. *Burkham*, 32 Mich. 328, 331,

Cooley, J., said,

"The beauty and value of the rules governing commercial paper consist in their certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper as between payee and drawee both acting in good faith could be made to depend on the motives which influenced the latter to honor the paper."

Citations to this point need not be dwelt upon; they are extremely numerous, and the principle is well settled.

IV.

Proof of damage by the delay in giving notice is not necessary.

The correctness of this proposition is involved in and necessarily follows from that stated in the next to the

last heading. If it is a strict rule of law that notice of a forgery must be given within a reasonable time of its discovery, and if, as appears from the cases cited, a reasonable time is from three to six days at the most from the date of discovery, it is clear that proof of damage after the lapse of that time need not be offered by the defendant, and even that evidence of absence of damage, if introduced by the plaintiff, would be irrelevant.

> *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163.

That damage will be presumed under such circumstances was expressly held by Mr. Justice Story in

> *United States Bank* v. *Bank of Georgia*, 10 Wheat. (U. S.) 333, cited *supra*.

In that case, as already noted, he said, page 344,

> "Proof of actual damage may not always be within his (the former holder's) reach; and therefore to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will therefore presume a damage, actual or potential, sufficient to repel any claim against the holder."

It is submitted that the reasons advanced by the learned justice for presuming damage are sound. In many cases the facts are such that prompt notice of

the forgery not only might, but probably would, have enabled the party receiving payment thereunder to take steps to protect himself and to bring the forger to justice. Proof of this possibility or probability might be obtainable — but proof of the certainty of the result would be most difficult, even impossible, to obtain. Therefore the potential damage without proof of actual damage is held sufficient to repel the plaintiff's claim.

As was well remarked by Judge Rapallo in

> *Continental National Bank* v. *National Bank of the Commonwealth*, 50 N. Y. 575,
>
> "The arrest and detention of a swindler are powerful means in coercing restoration of property he has unlawfully obtained, and the loss of these means in consequence of a reliance upon the declarations of another estops that other from denying the truth of the declaration."

In

> *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163 (*supra*),

the Court, p. 167, said:

> "The notice should have been given without unnecessary delay after discovery of the fraud to enable the bank to pursue any remedy it might have against the forger or endorser."

To the same effect was

Raymond v. *Baar*, 13 Serg. & Rawle (Pa.) 318 (*supra*).

In

President, etc., of the Gloucester Bank v. *President, etc., of the Salem Bank*, 17 Mass. 33, 46,

Parker, C. J., said:

> "The defendants then had no means of looking up those from whom they had received the notes, and although there is no evidence in the case from which it can be ascertained that they could have saved themselves if they had received earlier notice, the law itself will presume that a change of circumstances had taken place, which would justify them in resisting the action."

The application of the reasoning in the cases above cited seems particularly apt if it be remembered that in the case of the checks in question here (with the exception of the Mooy checks amounting to only $108.00), the plaintiffs had discovered the forgeries, collected the evidence against the forger, procured his indictment and secured his conviction, before they gave any notice whatever to the bank. In the case of some of the checks the plaintiffs even went to the extent of procuring the forger's formal deposition as to the forgeries and

brought this suit based partly thereon without giving the bank any notice. Who can say how far the bank's ability to recoup itself was affected by the forger's conviction and incarceration in prison, before it was notified of the claim against it, or what steps it might have taken to protect itself, or whether or not they would have resulted successfully if it had learned the facts while he was still free?

The precise point was considered in a very recent Pennsylvania case in which the arguments on both sides of the question were thoroughly considered on principle as well as authority, and the Supreme Court held squarely that upon discovering a forgery it is the absolute duty of a depositor in a bank which has paid out money upon his forged checks to give the bank prompt notice thereof; that his failure to do so will be an absolute defense to the bank in a suit by him to recover such money; and that the question whether greater promptness would have enabled the bank to recover the money from the forger will not be considered by the Court. It was expressly held that the depositor was not in this case negligent in failing to discover the forgeries earlier than he did, although they had extended through a period of nearly six years.

McNeely Co. v. *Bank of North America*, 70 Atl. Rep. 891 (Pa., Sup. Ct., June 2, 1908).

In this case the forgeries were discovered between January 1, 1904 and a date two or three weeks there-

after, but no notice was given to the bank until nearly three months afterwards. The court said (page 892),

> "When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and, when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for by withholding from it what he has discovered he can, as just stated, gain nothing, but it may lose all . . . He ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right."

(Page 893)

> "And again, in a suit brought by a depositor against a bank to recover the amount which it may have improperly paid on a forgery, the issue is the forgery. This issue ought not to be complicated with another, and a speculative one, as to whether anything might have been recovered from the forger, if prompt notice had been given to the bank of the forgery."

(Page 894)

> "When it is once shown that the plaintiff failed

> to give prompt notice of the discovery of the forgery, the plaintiff's right of action is gone. The law assumes, and does not find it necessary to conduct an inquiry to verify the assumption, that, had the notice been given promptly, the Central Bank might have taken steps to protect itself as against Williams."

The effect of the decision is apparently to overrule

> *Iron City National Bank* v. *Fort Pitt National Bank*, 159 Pa. St. 46,

which was one of the cases relied upon by Mr. Justice Lowell in deciding for the plaintiffs in the Circuit Court. (Record p. 23).

V.

If evidence of damage by delay is relevant, the burden of proof is on the *plaintiffs* to show absence of damage by the delay.

Even if it be assumed, for the sake of argument, that the position taken above is not correct, that the authorities cited above under IV. were wrong, and that proof of damage or absence of damage by the delay is necessary, then the question arises, upon whom is the burden of proof? The question is answered by the case of

> *Smith* v. *Mercer*, 6 Taunt. 76,

where the Court, in deciding that the position of the defendant might be seriously affected by failure to receive proper notice, said (p. 81),

> " Nor do I think it will be an answer to observe that nothing of this sort is stated in the case; for the plaintiffs had no right to cast upon the defendants the burthen of such proof, which, in point of law, if the fact had existed and could have made any difference, it was for themselves to produce."

PART II.

I.

Pension checks are commercial paper.

It is immaterial whether the instruments here involved are to be termed bills of exchange, drafts, checks or notes. They are in the ordinary form of a mercantile check, and it is enough that they have been held to be commercial paper by every Court before which the question has come. In all the cases cited by the parties in their original briefs in the court below, whatever differences of opinion there may have been on the question of necessity of proof of damage, all the judges agreed that paper of the kind in question was negotiable.

In

United States v. *Clinton National Bank*, 28 Fed. Rep. 357, cited *supra*,
United States v. *National Park Bank*, 6 Fed. Rep. 852, cited *supra*, and
United States v. *Central National Bank*, 6 Fed. Rep. 134,

the instruments were drafts by a paymaster on the Treasury Department.

In

United States v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259, and
United States v. *National Exchange Bank*, 45 Fed. Rep. 163,

the instruments were drafts by a pension agent on the Treasury Department.

In

United States v. *Cooke*, Fed. Cas. 14,855,

the instrument was a draft by an assistant surgeon upon a United States paymaster.

In

Wells, Fargo & Company v. *United States*, 45 Fed. Rep. 337, at 340,

it was flatly held that a pension check was commercial paper; and in

the same proposition was assumed.

The court of claims has decided that a bill of exchange drawn by a purser in the navy on the Secretary of the Navy was a negotiable bill, and that the United States was responsible for 15% damages for declining to honor it. Devereux Reports (U. S. Ct. Cl.), page 27.

Caleb Cushing, Attorney General in 1856, gave his opinion that bills drawn by the agents of the Government on other agents or depositaries are negotiable paper. 8 Ops. Attys. Gen. 1, at pages 3, 4.

The language of the Revised Statutes and acts subsequent thereto show that it was not only their intention to authorize pension agents to issue negotiable instruments, but that it is was their intention to authorize the use of checks,— not mere warrants,— but checks which once issued should be subject to all the ordinary rules governing such paper.

Rev. Sts. §4765 provides, that upon the receipt of certain vouchers from the pensioner,

> "the agent for the payment of pensions shall immediately draw his check on the proper assistant treasurer or designated depositary of the United States for the amount due such pensioner, payable to his order, and transmit the same by mail, directed to the address of the pensioner entitled thereto."

The words "check" and "payable to order" are applicable only to a well-known negotiable instrument. If Congress had intended to pay its pensioners over the counter by warrants, proceeds of which could not be obtained until presented by them or their collecting agents at the sub-treasury, the word "warrant" would have been the appropriate word to use; for the payment by a warrant was the usual mode of payment by counties and municipal corporations.

Moreover, the statute provides that the agent shall draw his check "on the proper assistant treasurer *or designated depositary*" in payment of the pension. Now it is perfectly clear that under that statute the agent has authority to issue his check drawn upon a National Banking Association which is a depositary of funds of the United States, and it is equally clear that a check upon such a depositary is a negotiable instrument like any other check. Such was squarely held by this Court in two cases.

> *Bank of the Republic* v. *Millard*, 10 Wall. (U. S.) 152,
> *First National Bank of Washington* v. *Whitman*, 94 U. S. 343.

In the first of these cases the Court said,

> "It is hardly necessary to say, that the check in question having been drawn on a public depositary, by an officer of the government in favor of a public

creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents."

Inasmuch as pension checks on the assistant treasurer and on public depositaries are mentioned in such close proximity, and the agent of the government is authorized to use either indifferently, it seems fair to assume that the rules which would be applicable to one should be equally applicable to the other.

To provide against the danger of the check falling into wrong hands and the possibility of the pensioner suffering by reason of its negotiability, it was provided (Sec. 4765 *supra*) that "any pensioner may be required, if thought proper by the commissioner of pensions, to appear personally and receive his pension."

Rev. Stats. §3646 as amended by Act of February 16, 1885, Cap. 123, provides as follows:—

"Whenever any original check is lost, stolen, or destroyed, disbursing agents and officers of the United States are authorized after the expiration of six months, and within three years from the date of such check, to issue a duplicate check; and the treasurer, assistant treasurers, and designated depositaries of the United States are directed to pay such duplicate checks, upon notice and proof of the loss of the original checks, under such regulations in regard to their issue and payment, and upon the execution of such bonds, with sureties, to indem-

> nify the United States, as the Secretary of the Treasury shall prescribe. This section shall not apply to any check exceeding in amount $2500."

The above provisions, which apparently now govern the issue of duplicate pension checks would not be necessary unless the checks were regarded as negotiable.

Also in the following statutes the instruments are referred to as checks.

In Rev. Sts. §4784, afterwards repealed, it was provided that upon certain contingencies, "the *check* for the pension . . . shall be given direct to the hand of the party entitled thereto, if desired."

In 1 Supp. Rev. Sts., Cap. 639, p. 761, it was enacted,

> "that hereafter a *check* or *checks* drawn by a pension agent in payment of pension due, and mailed by him to the address of the pensioner, shall constitute payment . . . in the event of the death of the pensioner . . . before the receipt of said *check*." [Italics ours.]

In Section 2 of the same statute, the instrument is referred to as a check, as also in 2 Supp. Rev. Sts. p. 437, Cap. 193, end.

The plaintiffs have relied strenuously upon the language of this Court in *The Floyd Acceptances*, 7 Wall (U. S.) 666, at 681:

The Court there said that there was no express author-

ity in any officer of the Government to draw or accept bills of exchange; that the authority to do so, not being one expressly given by statute, could only arise as incident to the exercise of some other power; and that as there could be no lawful occasion for any department of the Government or for any of its officers or agents to accept drafts drawn on them under any statute or other law then known to the Court, such acceptances could not bind the Government.

Accordingly, Mr. Daniel also says that it seems that there is no federal officer authorized to draw or accept drafts, for which he cites the same case. 1 Dan. on Neg. Inst., 5 ed. § 436. But it is submitted that the Floyd case can have no application here. It was decided in the year 1868, two years before the passage of the section providing for the drawing of pension checks, which was passed in 1870; and accordingly the fact that the Court did not then know of any statute expressly giving a federal officer authority to draw drafts, has no bearing. Under § 4765 of the Rev. Sts. such express authority was given a pension agent — unquestionably so, if he draw upon a public depositary.

Moreover the acceptances discussed in the Floyd case were accommodation acceptances, and the Court's statement may properly be taken to have referred to such only. In any event it was not necessary for the Court to decide that never under any circumstances could an officer of the Government draw or accept a draft, and in fact it carefully said that in case such authority should be granted, the rights of the Govern-

ment would be precisely those of an individual. In referring to the general power of an officer of the United States to become a party to bills of exchange, the Court says,

> "Whenever, in conducting any of the fiscal affairs of the Government, the drawing a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has a right to do, then he can draw and bind the Government in doing so." (Per Miller, J., at page 680.)

Furthermore the instrument exhibited as a sample in the case at bar conformed with all the requirements of the *Massachnsetts Negotiable Instruments Act*, Rev. Laws, Cap. 73, Sec. 18. It was an unconditional order; it was for a certain sum of money; it was to a person designated in the instrument or his order; it was payable on demand; it was signed by the agent of the maker duly authorized by Revised Sts. § 4765, and it was not, as contended by the plaintiffs, drawn against a particular fund, at least so far as could be gathered from anything within the four corners of the instrument, which is all that is important in determining whether an instrument is negotiable.

Alhough a check is ordinarily described as a draft upon a bank or banking house, that description is undoubtedly due to the fact that most checks are drawn upon a bank or banking house, but a check is not necessarily so drawn.

An order on a person who has agreed to advance money to the bearer may be by check.

Industrial Bank of Chicago v. *Bowes*, 165 Ill. 70 (1897).

The State courts have invariably treated pension checks as commercial paper:

In the case of

Cranz v. *White*, 27 Kan. 319,

the Court treats the deposit of and the dealings in these checks as in the regular course of business of the banks.

See also

Falkenburg v. *Johnson*, 102 Ky. 543.
Bullard v. *Goodno*, 73 Vt. 88.
Friend v. *Garcelon*, 77 Me. 25.
Farmer & Sons v. *Turner*, 64 Ia. 690.

II.

If pension checks are not in every respect to be treated as commercial paper, they are to be so treated to the extent that the same rule requiring notice should be applied.

The reason why municipal and county warrants have been held not to possess those qualities of commercial paper which cut off equitable defenses of the parties thereto in the event of a bona fide transfer for value is that under any other rule it might seriously embarrass or even bankrupt a municipal corporation should its agent or agents fraudulently issue negotiable securities. But although this principle is controlling in every case upon which it bears, yet in cases which have dealt merely with the question whether municipal and county warrants are negotiable and which have not involved the consideration whether a bona fide transfer would destroy defenses (based on fraud in issue) they have regularly been held to be negotiable.

Wall v. *County of Munroe*, 103 U. S. 74, 77.
Kelley v. *Mayor of Brooklyn*, 4 Hill (N. Y.) 263.
Harris v. *United States*, 27 Court Claims 177.
Dalrymple v. *Whitingham*, 26 Vt. 345.
Bull v. *Sims*, 23 N. Y. 570.
Ferguson v. *Staples*, 82 Me. 159, 163.
Varner v. *Nobleborough*, 2 Me. 121.
Crawford County v. *Wilson*, 7 Ark. 214.
Bromlee v. *Board of Commisioners of Madison County*, 81 Ind. 186.
Broyles v. *Board of Commissioners of Madison County*, 83 Ind. 599.
Craig v. *Richmond Dist.*, 7 Leg. Int. 26 (Pa., 1850).
Watson v. *City of Huron*, 97 Fed. Rep. 449.
Aylesworth v. *Gratiot County*, 43 Fed. Rep. 350.
Jerome v. *Commissioners Rio Grande County*, 5 McCrary (U. S.) 639.

These authorities show that such a warrant is negotiable paper — subject, it is true, to equitable defenses, but not subject, so far as the cases show, to any further restrictions. It may be likened to a negotiable promissory note which is overdue, indorsement of which will, of course, pass legal title to the holder subject to such defenses as then exist.

The effect of the above cases is that even municipal or government warrants will be invested with the qualities of commercial paper, in so far as such construction is not forbidden by the rule of public policy before mentioned. No such consideration applies in this case against the defendant's position. No public policy requires that the Government should be allowed to escape the just consequences of a negligent delay of several months or years in giving notice of the discovery of a forgery upon its paper. That the reverse is true was well stated by Mr. Justice Putnam in the court below, where he said,

> "Any demand for prompt payment in case of forgery is wholesome. When discovered, a forgery should not be coddled, but should be made known both to the public prosecutor and to those immediately concerned, and any attempted test with reference to the qustion whether the party from whom recovery is sought has suffered by delay is wholly unsatisfactory because the determination whether one who has suffered by forgery may recoup himself is more a matter of chances which cannot be estimated than the result of logical investigation of particular facts." (Record, p. 40.)

Furthermore there is good reason for a legal distinction between the checks of the Government and municipal or county warrants. The latter are comparatively few in number and are ordinarily negotiated to people in the locality who could without inconvenience present them in person. The payments by the Government, however, are large in number and are made in places at great distances from the capital. The aid of banks has therefore generally been utilized in their collection. As no bank could afford to take the risk of cashing them unless they were negotiable, they have been treated as negotiable in mercantile transactions.

PART III.

I.

That the United States are parties plaintiff in this action is immaterial.

(A)—As a party to such paper the United States stand in the position of any other litigant.

The rule is clearly settled and has never been departed from, that if the Federal Government becomes a party to negotiable paper, its rights and liabilities with respect to it are the same as those of a private person.

United States v. *Bank of the Metropolis*, 15 Pet. (U. S.) 377, 392, 393.

The Court there said,

> "When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibilities of individuals who are parties to such instruments."
>
> *United States* v. *Barker*, 12 Wheat. (U. S.) 559, 561.

It is there held that where the United States are holders of a bill of exchange, a delay of one day beyond the usual time of giving notice of non-acceptance to an indorser is fatal.

The above proposition is also supported by the following cases:

Cooke v. *United States*, 91 U. S. 389, 396.
The Floyd Acceptances, 7 Wall. (U. S.) 666, 675.
United States v. *Clinton National Bank*, 28 Fed. Rep. 357.
United States v. *Central National Bank of Philadelphia*, 6 Fed. Rep. 134.
United States v. *Cooke*, Fed. Cases, No. 14,855.
United States v. *National Exchange Bank*, 45 Fed. Rep. 163.
United States v. *Beebee*, 17 Fed. Rep. 36.
Walker v. *United States*, 139 Fed. Rep. 409.
United States v. *State Bank*, 96 U. S. 31, 36.
Mountain Copper Co. v. *United States*, 142 Fed. Rep. 625.
Buchanan v. *Knoxville, etc., Co.*, 71 Fed. Rep. 324, at p. 331.

(B) — If the foregoing proposition is correct, the Government may be bound by negligence of its agents in giving notice of the discovery of a forgery.

Such was expressly held in

Cooke v. *United States*, 91 U. S. 389, cited *supra*.

The Court there said, at page 398,

> " Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it fails in this, its claim upon the parties is lost."

Practically similar expressions will be found in almost all of the cases last cited.

II.

The United States cannot properly claim that in dealing with these checks they were outside the domain of commerce, so as to avoid the application of *Cooke* v. *United States*.

Of course the United States Government, acting within the sphere of the powers granted to it under the Constitution, is always and everywhere sovereign. Neverthess, in certain classes of cases, the Government, in spite of its sovereignty, will be treated by the courts *as if* it were a private individual and will not be allowed to take an unfair advantage of its position to the damage of its subjects, because the Government itself has voluntarily drawn this line, over which it will not step. The law is therefore clear that if the transaction is an ordinary business dealing similar to that commonly had between merchant and merchant, as the drawing of a negotiable instrument, and *was authorized*, the rights and liabilities of the United States will be the same before the courts as the rights and liabilities of a private individual.

> *United States* v. *Barker*, 12 Wheat. (U. S.) 559, 561, cited *supra*.

That the regular rules of commercial law are applicable to such cases, affirmatively appears from the discussion of the Court in

> *Wells, Fargo & Co.* v. *United States*, 45 Fed. Rep. 337, 340.
> *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259.

In the present case in the court below, Mr. Justice Aldrich, who wrote the dissenting opinion, seemed

strongly influenced by the consideration, that in dealing with the payment of pensions the Government was engaged in dispensing a charity and could not b on-sidered within the domain of commerce. It is submitted that the learned Justice might properly have distinguished between the philanthropic motive which caused the Government to direct its agent to pay a certain sum of money to the pensioner, and the commercial instrument it authorized that agent to use in carrying out its purpose. The former related to the Government and the pensioner alone. The latter, being a negotiable instrument, might relate, and in this case did relate, to third parties. It was, as to the latter, a matter of indifference whether the Government's check was drawn in payment for past services or for future services or for no services. Had the check been drawn on a national depositary, the latter would have had no more necessity or right to consider the Government's motives in issuing that check than it had to consider the motives of the Red Cross in drawing on it, for another apparently philanthropic purpose. The Government chose to avail itself of the many obvious advantages of making the payments to pensioners by checks. It thereby incurred certain accompanying disadvantages. It doubtless weighed the two and decided wisely that the advantages outweighed the disadvantages. In order the more efficiently to carry out its benevolent purpose, it laid aside its sovereignty, and chose a well-known commercial instrument subject to definite rules. By its own choice therefore it put itself on a par with its merchant

subjects and agreed to abide by the law merchant, because otherwise the chance of loss would unfairly be put upon those accustomed to rely upon that law.

It cannot be said that the government did not enter the domain of commerce because the checks were issued in payment of its own indebtedness. This was true in many of the cases above cited, true of the treasury notes in *Cooke* v. *United States*, issued in payment for money borrowed; and the proposition is disposed of by the decision in *United States* v. *Bank of the Metropolis*, 15 Pet. (U. S.) 377, in which the United States paid its indebtedness to mail contractors by accepting the drafts drawn by the contractors.

The case of *Cooke* v. *United States* also disposes of another argument strongly relied upon by Mr. Justice Aldrich in the court below. To a considerable extent he based his opinion upon the argument that it was not made the special duty of a particular official to give notice, and that *Cooke* v. *United States* only applies provided a particular official has been specially charged with the performance of a duty which he neglects with consequent loss. At p. 43, Record, he accordingly cites that case (p. 398) as follows:

> "'Generally, in respect to all the commercial business of the Government, if an officer specially charged with the performance of any duty, and authorized to represent the Government in that behalf, neglects that duty, and loss ensues, the Government must bear the consequences of his neglect. But this cannot happen until the officer

> specially charged with the duty, if there be one, has acted, or ought to have acted,'"

The citation of the remainder of the paragraph from which he quoted, seems to answer his objection. The opinion in *Cooke* v. *United States* continued as follows (p. 398):

> "As the Government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world."

If there is no officer charged with the duty of giving notice, the United States are responsible for this state of affairs. If any officer is charged with that duty, the Government is bound by his failure to give proper notice.

As a matter of fact, however, the Government has representatives who ought to give early notice in a case of this kind. There is nothing in the relation of the executive departments which made a delay of several months in giving notice of the forgery reasonable.

An investigation was started in pursuance of the provisions of Revised Statutes, Sec. 4744; on June 18, 1897, the Pension Bureau were informed of certain of the forgeries; from February to May, 1898, of the remainder. (Record, pp. 11, 12.)

It being necessary for the United States to bring suit, it was the duty of the Pension Department to turn the matter over to the Department Justice. (See Rev. Sts. §§ 356, 360, 361.)

Prompt notice being a condition precedent to the right of the United States to recover, it was the duty of either the Pension Department to give such notice, or of the Department of Justice as a part of its duties in prosecuting the suit. The responsibility for giving notice rested with one or both of these Departments.

The Pension Department must be presumed to have known that prompt notice was necessary; and it was therefore its duty either to give the notice promptly or to place the matter promptly in the hands of the Department of Justice so that that Department might promptly give the notice.

In dealing in commercial matters the relation between the Pension Department and the Department of Justice is the same as that between an individual and his counsel. No one would pretend that a delay of several months or years in giving notice of a forgery is to be justified, in order to give an individual an opportunity to place the matter in the hands of counsel.

These checks were drawn on the Treasury Department. It is submitted that under these circumstances the Treasury Department really acts as a bank of deposit for the Pension Department exactly as a Government depositary does, and no more delay should be allowed than in the ordinary case of a bank and its depositors. Indeed, in the main brief filed on behalf of

the United States in the court below, at page 5, the Government said,

> "It is submitted that for the purposes of this case the Assistant Treasurer and Pension Agent stand in the relation of banker and depositor."

If, as shown by the authorities cited above, the United States are bound by the same rule as private parties in regard to commercial paper, delay would certainly not be excused because matters may pass through several departments. Is it possible to limit the rule to departments at the head of which there is a member of the President's cabinet? Is it possible to apply the rule when, as is the case from time to time, a sub-department is transferred from one department to another?

As our great private corporations continue to grow, with their several departments and branches, why could they not plead the same reasons for delay, and thus gradually overthrow the whole law as to commercial paper on which our business interests rest, for the United States has undertaken the same responsibility as a private individual.

The present case affords the plaintiffs neither an equitable nor a legal claim against the defendant. The Government has paid out certain moneys, and because

it learns that the payments were made in reliance upon forged indorsements seeks to place its loss upon the bank, which, in good faith and with due care first honored the checks issued in payment. The Government seeks to place this loss on the bank notwithstanding the facts that it issued over two hundred checks and put them into circulation under circumstances calculated to deceive this or any other bank; that during the whole time it had in its possession, but failed to use the means of detecting the forgeries; that it failed to notify the bank of the forgeries for very long periods after payment; and that it continued to issue such checks after the first forgeries, and failed to notify the bank for months or years after discovering them. To accomplish this inequitable purpose, the Government must legally maintain either the position that the bank must prove how, if it had received reasonable notice, it could have recoverd the money it paid out, or the position that the bank is in an exceptional position because the check was that of the Government or was a pension check. It is submitted that it can maintain no one of these positions and that legally, as well as equitably, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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